CANADA

National Energy Board
Reasons for Decision

In the Matter of an Application Under Section 49 and Subsection 59(3) of the National Energy Board Act

of

Cyanamid Canada Pipeline Inc.

December 1986

National Energy Board
Reasons for Decision

In the Matter of an Application Under
Section 49 and Subsection 59(3) of the
National Energy Board Act

of

Cyanamid Canada Pipeline Inc.

December 1986

Cat. No. NE22-1/1986-14E
ISBN 0-662-15187-9

This report is published separately
in both official languages.

Copies are available on request from:

Regulatory Support Office
National Energy Board
473 Albert Street
Ottawa, Canada
K1A 0E5
(613) 998-7204

Printed in Canada

Ce rapport est publié séparément
dans les deux langues officielles.

Exemplaires disponibles auprès du:

Bureau du soutien de la réglementation
Office national de l'énergie
473, rue Albert
Ottawa (Canada)
K1A 0E5
(613) 998-7204

Imprimé au Canada

Recital and Appearances

IN THE MATTER OF the National Energy Board Act and the Regulations made thereunder; and

IN THE MATTER OF an application by Cyanamid Canada Pipeline Inc. to construct and operate natural gas pipeline facilities and for an order directing TransCanada PipeLines Limited to construct interconnecting facilities pursuant to Sections 49 and 59(3) of the National Energy Board Act.

HEARD at Ottawa, Ontario:

25, 26, 27, 28, 29 August 1986 and 2, 3 September 1986

BEFORE:

R.F. Brooks	Presiding Member
A.D. Hunt	Member
J.R. Jenkins	Member

APPEARANCES:

C.K. Yates P.A. Delemarre	Cyanamid Canada Pipeline Inc.
P.M. Owen B. Howell	Attorney General for the Province of Alberta
M.M. Peterson P. Warner C. Duncan T. Rein	C-I-L Inc.
R.B. Wallace	Council of Forest Industries of British Columbia
R. Meunier	Gaz Métropolitain, inc.
J.D. Brett	ICG Utilities (Manitoba) Ltd. & Greater Winnipeg Gas Company
P.F. Scully J. Roland	ICG Utilities (Ontario) Ltd.
S.W. Leishman	Inco Limited
R.G. DeWolf	Independent Petroleum Association of Canada
P.C.P. Thompson	Industrial Gas Users Association
J.C. McKechnie	Inland Natural Gas Co. Ltd.
N.D. Shende, Q.C.	Manitoba, Minister of Energy and Mines

J.M. Johnson	Minister of Energy for Ontario
R. Van Banning S. Geddes	Nitrochem Inc.
A.S. Hollingworth	Northridge Petroleum Marketing Inc.
J. Hopwood, Q.C.	Novacorp Pressure Transport Ltd.
J. Giroux	Procureur général du Québec
N. McPheeters	ProGas Limited
L.E. Smith	Simplot Chemical Company Ltd.
M.M. Peterson	Suncor Inc.
J.H. Farrell	The Consumers' Gas Company Ltd.
C.C. Black	TransCanada PipeLines Limited
B. Kellock A. Butler G.F. Leslie E.J. Hore	Union Gas Limited
H. Soudek	National Energy Board

Table of Contents

Appendices

Abbreviations

the Act; NEB Act	National Energy Board Act
AGT	Alberta Government Telephones
AERCB	Alberta Energy Resources Conservation Board
the Applicant; CCPI	Cyanamid Canada Pipeline Inc.
Bell	Bell Telephone Company
BNA Act	British North America Act, 1867
the Board	National Energy Board
CNCP	Canadian National Canadian Pacific Communications
CNR	Canadian National Railway
Consumers' (Gas)	The Consumers' Gas Company Ltd.
CRTC	Canadian Radio-Television and Telecommunications Commission
Cyanamid	Cyanamid Canada Inc.
GJ	Gigajoules
Irving	Irving Refining Ltd.
km	kilometre
Legislature(s)	Provincial legislature(s)
Luscar	Luscar Collieries
Mcf	thousands of cubic feet
mm	millimetre
NOVA	NOVA, An Alberta Corporation
O.D.	outside diameter
OEB	Ontario Energy Board
Ontario	Minister of Energy for Ontario
paragraph 92(10)(a)	paragraph 92(10)(a) of the Constitution Act, 1867
Parliament	Parliament of Canada
STS	storage transportation service
Supreme Court	The Supreme Court of Canada
TCPL; TransCanada	TransCanada PipeLines Limited
Telecom; Northern Telecom	Northern Telecom Ltd.
Union	Union Gas Limited
U.S.	United States of America
10^6m^3	Million cubic metres

Chapter 1
Background

1.1 The Application and Related Developments

By application dated 3 October 1985, Cyanamid Canada Pipeline Inc. ("CCPI") applied to the National Energy Board (the "Board") for, inter alia, an order of the Board, pursuant to Section 49 of the National Energy Board Act ("NEB Act") which would have the effect of authorizing the construction and operation of certain natural gas pipeline facilities. The application also requested an order, pursuant to subsection 59(3) of the Act, directing TransCanada PipeLines Limited ("TCPL") to construct interconnecting facilities between the TCPL pipeline system and the proposed facilities of the Applicant at TCPL's Black Horse Station, near Welland, Ontario.

These two facilities applications were included in an omnibus application dated 3 October 1985. In that application, CCPI, a wholly-owned subsidiary of Cyanamid Canada Inc. ("Cyanamid"), applied to the Board for various orders necessary to implement a direct purchase of Alberta natural gas for use in the ammonia plant of Cyanamid located near Welland, Ontario. CCPI sought orders that would require TCPL to provide transportation services and adequate facilities for the connection of its pipeline with a proposed CCPI pipeline; establish the toll for the transportation service rendered by TCPL; effectively authorize the construction of new pipeline facilities by CCPI in Ontario; and approve the price at which gas would be removed from the Province of Alberta.

CCPI made further application to the Board on 20 November 1985 for an interim order requiring TCPL to transport gas offered by CCPI from the Alberta border to the Black Horse Station in Ontario where the pipeline of the Consumers' Gas Company Ltd. ("Consumers") interconnects with the TCPL line. At the same time CCPI also requested that a toll be set for this transportation service.

On 5 December 1985, the Board issued interim Order No. TGI-9-85 which required TCPL to transport and deliver gas offered by CCPI, subject to certain terms and conditions. Order No. TGI-9-85 stipulated that it would "remain in effect until the Board's final decision in respect to the application of CCPI dated 3 October 1985 comes into effect or the decision of the Board in respect of the hearing to be held pursuant to Order No. RH-5-85 comes into effect, whichever shall last occur."

On 17 December 1985 and 28 February 1986, the Board issued orders amending Order No. TGI-9-85. These amending orders provided clarifications of the original order and approved certain alterations to the contractual arrangements for the delivery of gas among the various parties. Shortly thereafter, gas owned by Cyanamid began to be shipped from Alberta through the facilities of TCPL and Consumers' to the Welland plant.

The Board received comments from three parties respecting the facilities applications. By letter dated 16 October 1985, TCPL acknowledged receipt of CCPI's application and noted that, because of the nature of the application, it expected that the Board would set it down for public hearing. By letter dated 25 October 1985, Consumers' submitted its view that the proposed pipeline would be an intraprovincial undertaking and would not be within the Board's jurisdiction and that the application should be set down for public hearing. By letter dated 8 November 1985, the Minister of Energy for Ontario (Ontario) provided comments on the jurisdictional issue in respect of the application and suggested that a public hearing be held on the application following resolution of the jurisdictional issues.

By letter of 30 May 1986, CCPI noted that, at that time, Cyanamid was paying a demand charge of $0.75/GJ and a commodity charge of $0.24/GJ to

TCPL to transport gas from the Alberta border to the Black Horse Station in Ontario and also was paying a "double" demand charge of $0.75/GJ and a commodity charge of $0.25/GJ to Consumers' to transport the gas from the Black Horse Station to the Welland plant.[1] CCPI also indicated that one way of further reducing the cost of gas used in the Welland plant would be for CCPI to construct its own pipeline from the Black Horse Station to the Welland plant. For this reason, CCPI requested the Board to expeditiously consider and rule upon the balance of CCPI's application dated 3 October 1985.

1.2 Hearing Purpose and Procedure

The Board, by Order GH-3-86 (Appendix I), set down the CCPI application for public hearing. The hearing was held in Ottawa from 25 August to 3 September 1986. The purpose of the hearing was to obtain evidence and argument on two principal issues:

1. are the proposed facilities described in the application under the Board's regulatory jurisdiction? and

2. if the proposed facilities fall under the Board's jurisdiction, would it be in the public interest for the Board to exempt the proposed facilities from the provisions of certain sections of the Act, pursuant to Section 49 of the Act, and to order the connection of the CCPI pipeline with the existing pipeline of TCPL, pursuant to Section 59(3) of the Act?

In issuing its hearing order, the Board recognized the jurisdictional question as a matter preliminary to its decision on the merits of the application. However, it was clear that both the jurisdictional issue and the merits would be decided on evidence pertinent to the particular circumstances of this case, much of that evidence being common to the two matters to be decided. Accordingly, the Board made the procedural decision to hear, without interruption, all of the evidence on all of the questions before it. Interested parties were advised of this before the hearing commenced and were informed that the Board, following the close of the hearing, would decide the issue of jurisdiction and, if it found that the subject facilities were under NEB jurisdiction, would then proceed directly to decide the application on its merits.

---

1. In November 1986, the Federal Court upheld the Board's decision to disallow the charging of "double" demand. The method of reimbursing those charges is a matter of discussion at TCPL's 1986 toll hearing. During the hearing that is the subject of this report, a CCPI witness testified that direct purchase contracts typically provide for the producer to indemnify the purchaser for the "double" demand charges of $0.75/GJ.

Chapter 2
Jurisdictional Facts

Cyanamid utilizes approximately 230 10^6m^3 (8.6 x 10^6 GJ) of natural gas annually at its plant near Welland, Ontario. The Welland plant manufactures nitrogen fertilizer products and utilizes natural gas as its feedstock. A small proportion of its total natural gas requirements is also consumed as fuel. While there is no substitute for gas as a feedstock, the plant does have the capability to utilize alternate types of fuel. Prior to March 1986, Cyanamid purchased its total gas requirement from Consumers' which in turn purchased system gas from TCPL.

In the Western Accord of 28 March 1985, the Governments of Canada, Alberta, British Columbia and Saskatchewan agreed that a more flexible and market-oriented pricing regime was required for the domestic pricing of natural gas. The Agreement on Natural Gas Markets and Prices (the "Agreement") dated 31 October 1985 was intended to create the conditions for such a regime. As a result of those developments, consumers of gas became free to arrange for the purchase of their gas requirements directly from gas producers. Industrial and commercial consumers who could achieve lower gas costs by means of such direct sales entered into contractual sales arrangements with gas producers and applied to the Board for orders, pursuant to subsection 59(2) of the NEB Act, directing TCPL to transport the gas.

CCPI was incorporated in 1985 by Cyanamid for the express purpose of arranging for the purchase of natural gas in Alberta and the transmission of that gas from Alberta to Ontario for resale to Cyanamid at the Welland plant.

At the time of CCPI's letter to the Board of 30 May 1986, the direct purchase of natural gas from an Alberta producer had reduced Cyanamid's fuel and feedstock costs. Cyanamid had purchased the gas in Alberta, applied for and received an Alberta Energy Removal Permit, and had received interim regulatory approval for transmission of that gas on the TCPL and Consumers' systems. Gas flow to the Cyanamid plant, pursuant to those arrangements, commenced in March 1986.

By letter of 30 May 1986, CCPI requested the Board to consider expeditiously its earlier application, pursuant to Section 49 of the NEB Act, for approval of the construction and operation of a pipeline running from a point of connection with the TCPL pipeline system near Black Horse Station, Ontario to Cyanamid's plant. CCPI noted that such a pipeline would allow it to further reduce the cost of natural gas utilized in the Welland plant. CCPI also applied for an order, pursuant to subsection 59(3) of the NEB Act, directing TCPL to construct inter-connecting facilities between the TCPL pipeline system and the proposed CCPI pipeline at TCPL's Black Horse Station.

CCPI's proposed pipeline would have the effect of bypassing an existing pipeline, owned and operated by Consumers', which runs from the Black Horse Station to the Welland plant. The Consumers' system is regulated by the Ontario Energy Board ("OEB"). Evidence received at the hearing indicated that, by constructing and operating its own pipeline instead of using the Consumers' system to deliver direct purchases of gas to the Welland plant, Cyanamid could achieve cost savings, vis-à-vis the price it paid for gas utilized in the Welland plant, in the order of $0.18/GJ.

Evidence was received at the hearing concerning CCPI's arrangements for the purchase of gas in Alberta, the transportation of that gas to Ontario, and the resale of that gas to Cyanamid at the Welland plant. Cyanamid has entered into a gas purchase agreement with a gas producer in Alberta. Cyanamid proposes to assign this gas purchase agreement to its subsidiary, CCPI. The

gas would be purchased by the Alberta Petroleum Marketing Commission and resold to CCPI. The Alberta Energy Removal Permit in respect of that gas would be re-issued in the name of CCPI.

The purchased gas would be physically removed from the Province of Alberta and transported to Black Horse Station in Ontario pursuant to a nomination procedure. CCPI would nominate, as frequently as daily, a volume of gas required by the Welland plant for the following day. Nominations would be telecopied both to the Alberta gas producer and to TCPL's central gas control in Toronto. The Alberta gas producer would arrange for the transportation of the nominated volume of gas to the TCPL system at Empress, Alberta, via intraprovincial Alberta pipelines. The producer would then accept or decline CCPI's nominated volume of gas for the following day. The nomination form telecopied by CCPI to TCPL would state a nominated volume for delivery to TCPL on the following day at Empress and a nominated volume for receipt from TCPL at Black Horse, also on the following day. TCPL would check the capability of its system to accept the nominated volume at Empress and its ability to deliver it at Black Horse. TCPL would notify CCPI if it was unable to transport the nominated volume. If TCPL agreed to transport the nominated volume, gas would be delivered the next day at the Black Horse Station. CCPI would then take delivery of that gas and transport it directly to the Welland plant via the proposed 6.2 km pipeline. Gas delivered by TCPL to CCPI would be metered at the Black Horse Station, and again at the point of sale by CCPI to Cyanamid.

Evidence was received at the hearing with respect to the control of gas flow and the effect of that gas flow on the TCPL and proposed CCPI pipelines. The evidence indicated that TCPL could isolate the CCPI pipeline from the TCPL system by closing the manually operated valves which connect the two pipelines. However, there would be no method by which TCPL could vary the volume of gas flowing into the CCPI pipeline specifically. The circumstances under which TCPL would isolate a customer from its system are specified in its contracts and tariff. It was stated that these circumstances include force majeure, default of payment to TCPL by the shipper, and the failure of the shipper to have the gas delivered to TCPL at Empress. In all other circumstances, CCPI would control the flow of gas into its line, subject to such things as the pressure in the TCPL system at Black Horse, the capacity of the CCPI pipeline and the gas requirements of the Cyanamid plant, and subject to the influence of possible financial penalties which might be levied by TCPL due to variations between deliveries to and receipts from the TCPL system.

Chapter 3
Jurisdictional Arguments of Parties

3.1 Introduction

Two principal questions must be answered in order to determine whether the Board has jurisdiction over CCPI's proposed facilities:

- Do the proposed facilities come within the legislative authority of the Parliament of Canada pursuant to the Constitution Act, 1867 (or the British North America Act, as it then was)?

- If jurisdiction lies with the Government of Canada, do such facilities constitute a "pipeline" as that word is defined in Section 2 of the NEB Act?

Submissions in support of and in opposition to the proposition that the proposed CCPI facilities are under the jurisdiction of Parliament, pursuant to the Constitution Act, 1867, and of the National Energy Board, pursuant to the NEB Act, were received by the Board in legal briefs filed prior to the hearing and in oral argument during the hearing. Parties who espoused federal jurisdiction over the proposed facilities advanced three heads of legislative authority in support of their position:

(1) The CCPI pipeline is an integral part of the interprovincial work and undertaking of TCPL and is therefore within the exclusive legislative authority of Parliament pursuant to paragraph 92(10)(a) and subsection 91(29) of the Constitution Act, 1867.

(2) The CCPI pipeline is an integral part of the interprovincial undertaking of CCPI, which undertaking is subject to the exclusive legislative authority of Parliament pursuant to paragraph 92(10)(a) and subsection 91(29) of the Constitution Act, 1867. The interprovincial undertaking of CCPI, it was argued, comprises the purchase by CCPI of natural gas in Alberta, the arrangement by CCPI for the transportation of that natural gas from Alberta to Ontario using the facilities of NOVA, An Alberta Corporation (NOVA), TCPL and CCPI, and the sale of that gas to Cyanamid in Ontario for use at the Welland plant.

(3) Regulation of the CCPI pipeline is within the exclusive jurisdiction of Parliament to regulate trade and commerce pursuant to subsection 91(2) of the Constitution Act, 1867.

The following sections describe the salient points of the arguments presented.

3.2 The "Works and Undertakings" Arguments

The arguments, above-outlined in (1) and (2), rely on the combined effect of subsection 91(29) and paragraph 92(10)(a) of the Constitution Act, 1867 to attract federal jurisdiction to the CCPI facilities.

Section 91 of the Constitution Act, 1867 sets forth those matters that are within the exclusive legislative authority of Parliament. Pursuant to subsection 91(29), Parliament has exclusive jurisdiction over:

> "Such Classes of Subjects as are expressly excepted in the enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Paragraph 92(10)(a) of the Constitution Act, 1867 provides that, in each province, the Legislature may exclusively make laws in relation to:

> "Local Works and Undertakings other than such as are of the following Classes: -
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works and Undertakings connecting the Province with any

other or others of the Provinces, or extending beyond the Limits of the Province;".

Paragraph 92(10)(a), when read in conjunction with subsection 91(29) of the Constitution Act, 1867, confers on Parliament the power to make laws in relation to works and undertakings which connect a province with any other or others of the provinces, or which extend beyond the limits of a province. Local works and undertakings which do not connect a province with any of the others are within the exclusive jurisdiction of each province.

All parties to the hearing agreed that although pipelines are not specifically mentioned in paragraph 92(10)(a) of the Constitution Act, 1867, it is now well established that a pipeline does fall within the scope of that section[2].

Under the scenarios described in both arguments (1) and (2) it is necessary to establish that there exists a transportation undertaking which connects the province of Ontario with any of the other provinces or which extends beyond the limit of the province of Ontario and which includes the proposed CCPI facilities so as to bring them within the paragraph 92(10)(a) exception.

Parties advancing arguments (1) and (2) cited Luscar Collieries Ltd. v. McDonald (Luscar Collieries)[3] in support of the proposition that a facility may not reach the boundary of a province but if it connects with a system that does, then it becomes a link in a chain connecting one province with another. Thus, it was submitted, the fact that the CCPI facilities would be located entirely within the province of Ontario is not conclusive of provincial jurisdiction in respect of these facilities.

It was submitted that the proposed physical connection between the CCPI facilities and the TCPL pipeline establishes a prima facie case for federal jurisdiction.

It was further submitted that the fact that TCPL owns its main transmission lines from Alberta and that CCPI would own the delivery facilities in Ontario is not conclusive of provincial jurisdiction over CCPI facilities. The Westspur[4] and the Alberta Government Telephone[5] cases were cited in support of the proposition that the character of an undertaking involving inter-connecting systems is not determined by ownership of any one part.

Parties who advanced argument (1) submitted that the most important factor in determining whether the CCPI facility was part of the interprovincial undertaking of TCPL was the extent and the degree of the integration between the CCPI facility and the acknowledged and existing interprovincial undertaking of TCPL. Several cases were cited as authority for this test[6]. It was argued that the TCPL pipeline and proposed CCPI delivery line would form an integral, indivisible and necessarily cooperative whole for the direct and continuous flow of natural gas from Alberta to the Cyanamid plant in Welland, Ontario.

Several parties to the hearing submitted that the proposed CCPI facilities would be an integral part of the interprovincial undertaking of CCPI. The interprovincial undertaking of CCPI, it was argued, comprises the purchase of natural gas in Alberta, the arrangement for the transmission of that gas to Ontario, the transmission of the gas to the Welland plant using the CCPI pipeline, and the sale of the gas to Cyanamid at the plant gate. It was submitted that, under this scenario, the test is not the degree of integration between the CCPI facility and the TCPL system but, rather, the purpose and the nature of the total CCPI undertaking. It was argued that the evidence demonstrates that the CCPI facilities are not merely an addition at the end of the existing interprovincial TCPL line but are also an essential element in the undertaking of CCPI.

Parties who argued against federal jurisdiction in this case submitted that the fact that the proposed CCPI facilities would be located entirely within Consumers' franchise area in southern Ontario, while not conclusive of provincial jurisdiction, was nevertheless indicative of the local nature of the facilities. Further, it was argued, although the

---

2. Campbell-Bennett Limited v. Comstock Midwestern Limited and TransMountain Oil Pipeline Company, [1954] S.C.R. 207; Saskatchewan Power Corp. v. TransCanada PipeLines Limited, [1979] 1 S.C.R. 297.

3. [1927] A.C. 925 (J.C.P.C.)

4. Re Westspur Pipe Line Co. Gathering System, [1957] 76 C.R.T.C. 158.

5. Alberta Government Telephones v. Canadian Radio-Television and Telecommunications Commission et al. (1985), 17 Admin. L.R. 149 (F.C.T.D.); 17 Admin. L.R. 190 (F.C.A.).

6. For example, Capital Cities Communication et al. v. C.R.T.C. et al (Capital Cities), [1978] 81 D.L.R.(3d.) 609(S.C.C.); The Corporation of The Township of Flamborough v. The National Energy Board (1984), 55 N.R. 95 (F.C.A.).

proposed facilities would be physically connected to an interprovincial work (the TCPL system at Black Horse Station), physical connection in and of itself does not bring the proposed facilities within the jurisdiction of Parliament. In support of this proposition, parties cited the Montreal Street Railway and the British Columbia Electric Railway cases[7].

It was submitted that the correct test to apply in determining whether the CCPI and TCPL facilities are functionally and operationally integrated, in such a way and to such a degree as to constitute a single undertaking for constitutional purposes, was whether or not the existing core federal undertaking of TCPL would be dependent on the proposed CCPI facilities[8]. It was argued that although the proposed facilities would, in a sense, be dependent upon TCPL facilities, the converse would not be true and hence the proposed facilities would not form an integral part of TCPL's system.

Parties who argued in favour of provincial jurisdiction over the proposed CCPI facility submitted that the facility would not be functionally or operationally integrated with the existing interprovincial work of TCPL such that the two facilities could be considered to be one interprovincial system. The Winner[9] and the Go Train[10] cases were cited in support of the proposition that operational unity involved more than mere cooperation and agreement in respect of daily deliveries of gas and can exist only where the same physical work is being used or has the potential to be used as both an interprovincial and intraprovincial work. It was submitted that the proposed CCPI facilities could not be used in such a manner.

The Cannet Freight[11] case was cited in support of the proposition that a shipper on a system between or spanning two provinces does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking. Thus, it was argued, although CCPI would be a shipper on the TCPL system, CCPI's business would not thereby comprise an interprovincial undertaking in and of itself.

3.3 The Trade and Commerce Argument

Parties who argued in support of federal jurisdiction over the proposed facilities submitted that the CCPI facilities are designed to complete a scheme for the purchase of gas in the province of Alberta and the carriage of that gas to Ontario. It was suggested that such a scheme constituted interprovincial trade of gas and is therefore within the jurisdiction of Parliament pursuant to subsection 91(2) of the Constitution Act, 1867. This argument was not well developed by any of the parties at the hearing.

Parties who argued against the trade and commerce head of jurisdiction submitted that decisions of the Privy Council and of the Supreme Court of Canada dealing with the trade and commerce power indicate that, in enacting a scheme designed to regulate interprovincial trade and commerce, Parliament cannot regulate transactions which are completed wholly within a province. It was argued that the federal trade and commerce power is a very restrictive head of legislative competence and has been circumscribed by the case law, inter alia, because if it is taken in its widest sense, it could seriously encroach on the legislative competence of the provinces, including provincial jurisdiction over property and civil rights.

It was further submitted that the legislative provisions upon which the CCPI application is based are not, in pith and substance, provisions in respect of the regulation of interprovincial or international trade and commerce. Rather, it was argued, the relevant provisions of the NEB Act conferring jurisdiction on the Board in respect of natural gas pipelines, in pith and substance, concern transportation systems and, constitutionally, are based solely upon the Federal Government's authority over interprovincial transport, pursuant to paragraph 92(10)(a) of the Constitution Act, 1867.

---

7. City of Montreal v. Montreal Street Railway, [1912] A.C. 333; The British Columbia Electric Railway Company Limited et al. v. Canadian National Railway Company et al., [1932] S.C.R. 161.

8. In the Matter of a Reference as to the Validity of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152 (Stevedoring Reference), [1955] S.C.R. 529; The Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al., [1975] 1 S.C.R. 178; Northern Telecom of Canada Limited et al. v. Communications Workers of Canada et al., [1983] 1 S.C.R. 733.

9. Attorney-General for Ontario and Others v. Israel Winner, [1954] A.C. 541.

10. Her Majesty the Queen v. Board of Transport Commissioners (1967), [1968] S.C.R. 118.

11. Re. Cannet Freight Cartage Ltd. and Teamsters Local 419, [1975] 60 D.L.R. (3d.) 473 (F.C.A.).

Chapter 4
Legal Principles and Board's Views

4.1 Introduction

All parties to the hearing agreed that in order to conclude that two operations, owned and operated by separate entities, constitute a single undertaking for constitutional purposes, it is necessary to demonstrate that the two operations are functionally and operationally integrated in such a way and to such a degree that they form one continuous, indivisible and integrated undertaking. Parties did not agree, however, on what test should be applied to the facts in this particular case in order to establish the requisite degree of integration. This is hardly surprising. The degree of dissent in the decisions of the Supreme Court of Canada dealing with the particular constitutional issue before the Board in this case is indicative of the difficulty in formulating a definitive test. No clear criteria or test appear to have emerged from the case law to date with respect to assessing the nature and degree of requisite integration; various judgments have suggested various tests. It appears that the approach favoured by a court in any particular case has been largely a function of the particular facts before the court in that case.

Various tests were suggested by parties to determine when two facilities were so operationally and functionally integrated as to constitute one single undertaking. These tests can be roughly divided into three categories:

1. "the vital, essential or integral to the undertaking" test;

2. the "purpose/nature of the undertaking" test; and

3. the "link in the chain" test.

4.2 The "Vital, Essential or Integral to the Undertaking" Test

The "essential" test, as it is referred to hereinafter, was expressly defined for the first time in the Stevedore[12] case although earlier cases have alluded to the "necessarily incidental" factor[13].

In the Stevedore[12] Case, the issue before the Supreme Court of Canada was whether employment in a stevedoring company should be governed by federal or provincial labour legislation. The stevedore company provided loading/unloading services to several shipping companies in Canadian ports but was owned independently of the shipping companies and its operations in each port were entirely local. The shipping companies were under federal jurisdiction pursuant to paragraph 92(10)(a) of the Constitution Act, 1867.

The Supreme Court of Canada held that the stevedores came within federal jurisdiction because their operations were an integral and essential part of the interprovincial transportation of goods by ship. The Court noted that there could be no effective shipping operation if the ships were not loaded and unloaded at port.

A similar conclusion was reached in the Postal Worker's[14] case. In that case, employees who, inter alia, collected and delivered mail on behalf of Canada Post, were determined to fall under federal labour legislation. In reaching that decision, the Supreme Court of Canada agreed with and relied on the test adopted by Mr. Justice Estey in the Stevedore [12] case.

---

12. Supra, footnote 8.

13. In B.C. Electric Railway Company v. Canadian National Railway Company [1932] S.C.R. 161, the Supreme Court of Canada held that the power of the Board of Railway Commissioners to regulate a one mile segment of a local line, which segment in effect connected two federally-regulated lines, was not "necessarily incidental" to the Board's jurisdiction over the federal lines.

14. Supra, footnote 8.

However, in Canadian National Railway v. Nor-Min Supplies Limited[15], a stone-quarrying operation which exclusively served the CNR was held by the Supreme Court of Canada to be convenient but not essential to the operation of the rail line.

Similarily, in Re Cannet Freight Cartage and Teamsters' Local 419,[16] the Federal Court of Appeal considered an application to set aside an order of the Canada Labour Relations Board certifying a bargaining agent for a unit of the applicant's employees. The Court concluded that freight-loading business was entirely local and was not essential to the operation of the Canadian National Railway (CNR).

In Construction Montcalm v. Minimum Wage Commission[17], the Supreme Court of Canada considered whether or not employees involved in the construction of an airport runway were governed by federal or provincial labour legislation. In reaching the conclusion that provincial laws applied, despite the fact that the airport was unquestionably a federal undertaking, the Court held that the question of whether an undertaking, service or business is federal depends on the nature of the undertaking; one must look at the normal or habitual activities of the business as a "going concern" without regard for exceptional or casual factors. The Court noted at page 768-69:

> "...primary federal competence over a given subject [in that case the airport] can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral part of such federal competence."

The "essential" test was well canvassed in the two Northern Telecom[18] cases. In those cases, the Supreme Court of Canada considered the jurisdiction of the Canada Labour Relations Board to certify a bargaining agent for a telecommunications manufacturer whose business was almost exclusively comprised of installation work done for Northern Telecom Ltd., a recognized interprovincial undertaking. In Telecom #1,[18] at page 132, Justice Dickson, summarizing the applicable legal principles, noted:

> "First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously categorized as "vital", "essential" or "integral" ".

4.3 The "Purpose/Nature of the Undertaking" Test

The "purpose" test, as it is hereinafter referred to, was first definitively applied in the Bell Telephone[19] case where it was argued that the Bell Telephone Company carried on two separate and distinct businesses: a local business and a long-distance business. It was contended that the local business fell within provincial jurisdiction. The Privy Council did not accept this proposition and held that Bell was no different than a railway company which had a large degree of suburban traffic as well as miles of long-distance rails. It concluded that Bell was a single undertaking. It should be noted that, in this case, the lines used for local calls were the same as those which would be used for long-distance calls and long-distance service had yet to be established. The Privy Council, nevertheless, held that it was sufficient that the company's corporate objects gave it the power to operate a long-distance service. In effect, the Privy Council held that the purpose of the company was to provide, inter alia, long-distance service.

In the Town of Beauport[20] case, the Supreme Court considered an appeal of an order of the Board of Transport Commissioners, which order ruled that the Board had no jurisdiction with respect to the tolls charged by Quebec Railway Light and Power Company in respect of a motor bus service operated by it. Quebec Railway Light and Power Company

---

15. [1977] 1 S.C.R. 322.

16. Supra, footnote 11.

17. [1979] 1 S.C.R. 754.

18. Northern Telecom Ltd. v. Communication Workers of Canada et al. (Northern Telecom #1) [1980] 1 S.C.R. 115; Northern Telecom #2: [1983] 1 S.C.R. 733.

19. Corporation of the City of Toronto v. Bell Telephone Company of Canada, [1905] A.C. 52.

20. Quebec Railway Light & Power Co. v. Town of Beauport, [1945] S.C.R. 16.

was a federal corporation which had been declared to be a work for the general advantage of Canada pursuant to Section 91 of the BNA Act, 1867.

In coming to its decision that the Board did in fact have jurisdiction over the bus line service, the Court held that the addition of the bus service was intended to more efficiently carry out the original and essential purpose of the undertaking:

> "The controlling fact is that the identity of the work is preserved; they remain in substance the works of transportation dealt with by the declaration"[21].

In the Empress Hotel[22] case, the Privy Council held that the Empress Hotel in Victoria, B.C., although owned and operated by a single corporate entity, was an undertaking separate from the CNR undertaking. In reaching this conclusion, the Privy Council examined the type of businesses carried on by the hotel and by the railway and concluded that, although the two businesses complemented each other, the hotel and the railway had different business purposes.

In the much quoted Winner[23] case, the Privy Council considered whether the Province of New Brunswick had regulatory authority over a bus line which operated from the United States, through New Brunswick, and into Nova Scotia. The bus line picked up and dropped off passengers at various points within New Brunswick and the Provincial Highway Board sought to regulate this part of the bus line's business. The Privy Council refused to recognize the province's regulatory authority over these local journeys and held that there was no evidence that there were two separate enterprises. The Privy Council at page 581, noted:

> "The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather, what is the undertaking which is in fact being carried on. Is there one undertaking and as part of that one undertaking does the respondent carry passengers between two points both within the province or are there two?"

The Privy Council, relying on the principle enunciated in Bell Telephone,[24] held that the undertaking of Mr. Winner, which had both inter- and intraprovincial aspects, was in fact one and indivisible because the same routes and the same buses were used in both the inter- and the intraprovincial operations.

In the Go Train[25] case, the Supreme Court held that the commuter service proposed to be operated by the Ontario Government over CNR owned and operated rail lines, although a purely local service, was not a distinct undertaking. The Supreme Court refused to "hive-off" the local commuter service and seems to have premised its decision on the fact that the commuter service, while local in character, ran over CNR lines. It concluded that Parliament had jurisdiction over everything that physically formed part of a railway that was subject to its jurisdiction.

In the Kootenay & Elk Railway[26] case, although the Supreme Court held that the provincial legislature could authorize the construction of a rail line which came within one quarter inch of the United States border and the junction of another rail line, the Court implied that such a railway, could, by reason of a future interconnection with the other rail line and its operation, become subject to federal regulation at a later date. Thus, although the province had the jurisdiction to authorize the initial construction of the line, when the line changed from a purely local line to an internationally operated line, its purpose would change and the jurisdictional authority would shift.

The "purpose" test has been applied to a greater or lesser extent in many other cases including the McAfee et al. v. Irving Refining Ltd. et al.[27] case, the Fulton v. Calgary Power[28] case and the Flamborough[29] case. In all of these cases, the courts made reference to the true nature or

---

21. Supra, Footnote 20 per Rand, J. at p. 39.

22. Canadian Pacific Railway Company v. Attorney-General for British Columbia, [1950] A.C. 122.

23. Supra, footnote 9.

24. Supra, footnote 19.

25. Supra, footnote 10.

26. Kootenay and Elk Railway Company et al. v. Canadian Pacific Railway Company, [1974] S.C.R. 955.

27. [1970] D.L.R. (3d) 729.

28. [1981] 1 S.C.R. 153.

29. Supra, footnote 6.

purpose of the undertaking. For example, in the Fulton[30] case, the Court concluded that the true purpose of the electrical distribution system was to serve the province of Alberta and, as such, the system was not an interprovincial undertaking despite the fact that the system had the potential to connect to the electrical system of an adjoining province. Similarly, in the McAfee[31] case, the New Brunswick Supreme Court decided that the essential purpose of the Irving undertaking was the refining of oil and that other aspects of the undertaking were merely incidental to that essential, purely local undertaking. In the Flamborough [32] case, the Federal Court of Appeal, in arriving at its decision, examined the true character of the undertaking and concluded that the line alteration did not change the character of the undertaking and that the altered line was therefore part of Interprovincial Pipe Line Limited's entire system.

The most recent case falling into the "purpose" category is the AGT[33] case, which is currently under appeal to the Supreme Court from a decision by the Federal Court of Appeal. The issue in AGT[33] arose out of an application by Canadian National Canadian Pacific Communications (CNCP) to the Canadian Radio-Television and Telecommunications Commission (CRTC) (rather than to the Alberta Public Utilities Board, AGT's traditional regulator), for an order requiring AGT to provide facilities for the inter-exchange of telecommunications traffic between CNCP and AGT's networks. AGT applied to the Federal Court, Trial Division for an order prohibiting CRTC from dealing with the application on the grounds that the telephone company was properly subject to provincial jurisdiction.

The Trial Division of the Federal Court decided that AGT was subject to federal jurisdiction pursuant to subsection 91(29) and paragraph 92(10)(a) of the Constitution Act, 1867. The Court noted that AGT, together with the other telephone companies that comprise Telecom Canada, operates its telecommunications undertaking as an interprovincial undertaking. The Court found that AGT was physically connected with systems of telecommunication carriers outside Alberta and participated in the operation of an integrated and interdependent interprovincial telecommunications system. The proper test for deciding whether an undertaking is local or interprovincial under subsection 92(10) is whether the undertaking participates in a "significant amount of continuous and regular interprovincial activity." In countering AGT's argument that its physical facilities do not extend outside the boundaries of the province of Alberta, Madame Justice Reed noted that the crucial feature in deciding whether an undertaking is local or interprovincial is not the location and nature of the physical facilities of the enterprise but rather, is the nature of the enterprise itself. Physical interconnection is not sufficient, in and of itself, to bring an enterprise under federal jurisdiction: "Something more is needed and this has been described as how the system is operated."[34]

The decision of the Trial Division of the Federal Court in the AGT [33]case was confirmed, in respect to its finding in this regard, by the Federal Court of Appeal.

4.4 The "Link in the Chain" Test

This test first emerged in the Luscar Collieries[35] case. In that case, the Privy Council considered the jurisdiction of a branch rail line operated by CNR for the benefit of the appellant, Luscar Collieries. The Privy Council held that the branch line was part of a continuous system of railways operated together by the CNR and connecting Alberta with other provinces. It was further held that any section of the overall system which did not reach or cross a provincial boundary was nevertheless part of the interprovincial undertaking as it could be considered a "link in the chain" of connection and could properly be said to connect one province with another.

The fact that the CNR operated the Luscar line in this case permitted coal to be shipped from the coal operation into interprovincial trade via the Luscar line. This was an important factor in the Privy Council coming to its decision in this case. Subsequent cases have suggested that if the branch line had not been operated by CNR, the Privy Council might well have come to the opposite conclusion.

The decision of the Supreme Court in the Capital Cities[36] case also used a "link in the chain" analogy. In that case, the Court had to determine

30. Supra, footnote 28.
31. Supra, footnote 27.
32. Supra, footnote 6.
33. Supra, footnote 5.
34. Supra, footnote 5, at page 177.
35. Supra, footnote 3.
36. Supra, footnote 6.

the question of whether a federal regulatory agency, the CRTC, could authorize cable television companies to delete the commercials from American television programs captured by the cable companies from the air, and to replace the deleted commercials with Canadian commercials. The American programs, with the Canadian commercials, would then be distributed by the cable television companies to their subscribers. The question of whether this practice could be authorized by the CRTC raised the constitutional question of whether Parliament had authority over the cable television undertaking. The Court held that Federal power over broadcast television extended to the cable system pursuant to paragraph 92(10)(a) of the Constitution Act, 1867.

The Supreme Court noted, at page 621 of the judgement, an American case in which it had been held that a cable television system was not necessary or essential to the receipt of signals by a viewer equipped with a television and a well-located antenna. A television and an antenna could perform the same basic function as a cable television system. Be this as it may, the Supreme Court nevertheless went on to hold that the entire broadcasting undertaking was dependent on extraprovincial signals which the cable system picked up and delivered to end users. The cable system was dependent on these extraprovincial signals and was no more than a conduit for them, albeit not an "essential" conduit.

In the Capital Cities[37] case, parties opposing federal jurisdiction over the cable system did concede that Parliament had constitutional authority over the reception of broadcast signals by the cable operator's head-end or receiving apparatus. It was argued however that the distribution system - the network of cable that carries the signal from the head-end to the television sets in the homes of the cable subscribers - was a separate, local undertaking within provincial jurisdiction. This argument was rejected by Chief Justice Laskin speaking for the majority of the Supreme Court. He held that the head-end and the distribution system were parts of an indivisible communications undertaking within the legislative competence of Parliament. The cable system could not be separated from a telecast because it was "no more than a conduit for signals from a telecast". It would be "incongruous", he held, "to deny the continuation of regulatory authority because the signals are intercepted and sent on to ultimate viewers through a different technology". This decision was taken despite the fact that the cable system was not essential to the broadcasting undertaking and only served subscribers in Ontario.

The decision of the Supreme Court in the Public Service Board v. Dionne[38] was handed down on the same day as the decision in the Capital Cities[37] case. Laskin, writing for the majority, struck down a Quebec law purporting to authorize a provincial agency to licence cable television systems within the province. Laskin affirmed the exclusivity of federal regulatory power over cable television pursuant to paragraph 92(10)(a) of the Constitution Act, 1867 and re-affirmed the Court's refusal to divide constitutional control of "what is functionally an inter-related system".

4.5 The Board's Views

The Board notes that the "essential" test has been developed almost exclusively in the context of labour relations cases. In the Board's view, this fact is important. Parliament has no authority over labour relations as such nor over the terms of a contract of employment. Generally speaking, legislation respecting employer and employee relationships relates to property and civil rights and is within the exclusive jurisdiction of the provincial legislature pursuant to subsection 92(13) of the Constitution Act, 1867. By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

The Courts have imposed a stringent test for determining whether and when a federal Labour Board has the jurisdiction to regulate the labour relations of operations in areas which are linked to, but which are not directly within, federal jurisdiction. It is necessary to demonstrate that the related, subsidiary operation is "vital", "essential" and "integral" to the operation of the core federal undertaking in order to overcome the presumption in favour of provincial competence over labour relations.

It is also important to note that, in all of the cases which have been grouped into the "essential"

---

37. Supra, footnote 6.

38. [1978] 2 S.C.R. 191.

category, two completely different activities are carried out in conjunction with each other. For example, a shipping business is associated with a stevedoring business, a railway business is associated with a freight-forwarding business, and a post office is associated with a mail-delivery business. The question then becomes: "are the two activities sufficiently integrated that they should be treated as one?" The issue in these cases is whether there exists the necessary degree of integration so as to include the subsidiary service as part of the core federal undertaking. In such cases, the concept of "essential" or "necessarily incidental" makes sense.

Such is not the situation with respect to the proposed CCPI facility; CCPI does not propose to provide a service to or upon TCPL. The activity which will be carried on by CCPI is much the same sort of activity currently carried on by TCPL: the movement of gas from point "A" to point "B". Thus, the Board is not persuaded that the "essential" test, as it has been applied in the context of the labour relation cases, is appropriate given the circumstances in this case. Even if the Board is wrong in this regard, the fact that the CCPI facility cannot be said to be essential to a core federal undertaking - TCPL - is not, in the Board's view, necessarily fatal to the case for federal jurisdiction.

It is clear that no single or discrete test has emerged from the body of case law that has been grouped into the "purpose" or "link in the chain" categories of cases, vis-à-vis the characterization of an undertaking as "local" or "interprovincial". In struggling with the question of just how much and what kind of integration is required for two undertakings to be considered as one, the courts have identified a number of factors such as physical location and connection, ownership, operational integration and functional integration of and between the undertakings in question. No single factor is, in and of itself, conclusive of the issue. It would appear that some element of judgement and subjective valuation must be brought to bear on the final determination.

Chapter 5
Application of Legal Principles - Decision on Jurisdiction

5.1 Foreword

Throughout the consideration of the CCPI application, it has been obvious that the NEB decisions on the jurisdictional question and on the merits of the proposal could have far-reaching implications. Nevertheless, the Board made it clear that the proceeding was not a generic one on the issue of bypass, nor was it a general inquiry into federal versus provincial regulatory jurisdiction. Accordingly, in approaching the complex and difficult issues bearing upon jurisdiction in this case, the Board was first and foremost concerned with the correct application of the law in respect of the facts relevant to the particular application before it.

5.2 Whether the CCPI Proposed Facility is an Integral Part of the Interprovincial Undertaking of CCPI

It was argued that the undertaking of CCPI consists of the purchase of natural gas in Alberta, the transportation of that gas across Canada utilizing the facilities of NOVA, TCPL and CCPI, and the sale of the gas to Cyanamid at the Welland plant. This undertaking, it was argued, is subject to the exclusive legislative authority of Parliament pursuant to subsection 91(29) and paragraph 92(10)(a) of the Constitution Act, 1867.

There are certainly interprovincial aspects associated with the undertaking of CCPI in respect of the procuring and transporting of gas from Alberta to the Welland plant. However, contractual arrangements to procure the gas and effect its transport to Ontario, utilizing the interprovincial undertaking of TCPL, does not, in the Board's view, in and of itself, constitute an undertaking of the nature contemplated by paragraph 92(10)(a) of the Constitution Act, 1867. Section 92 refers to interprovincial works or undertakings of a transportation or communication nature. Hogg, in the second edition of Constitutional Law of Canada, at page 486, notes that, although the question of whether paragraph 92(10)(a) is confined to works and undertakings involved in transportation or communication has never been decided by the courts, it would appear that Parliament cannot assert jurisdiction over an enterprise which spreads beyond the limits of any one province but which is not engaged in transportation or communications, pursuant to paragraph 92(10)(a). He notes that the general phrase "other works or undertakings connecting the province with any other", should be read eiusdem generis with the specific examples which precede it, and the specific examples are all modes of transportation or communication. Paragraph 92(10)(a) has never been held applicable to any work or undertaking which is not of a transportation or communication character.

In the Board's view, contractual arrangements to procure gas in Alberta and effect its transport to Ontario are not arrangements which can properly be characterized as a transportation or communication undertaking. Such arrangements do result in the utilization of the interprovincial undertaking of TCPL but the maker of these contractual arrangements (i.e. CCPI, the shipper) does not thereby become the operator of that interprovincial undertaking. The operator remains TCPL. In reaching this decision, the Board was mindful of the decision of the Federal Court of Appeal in Re Cannet Freight Cartage Ltd.,[39] where at page 475, Chief Justice Jackett stated:

> "Even if the applicant's activities ... are viewed as integral parts of a whole, in my view they do not constitute an 'undertaking' that falls within s. 92(10)(a) of the British North America Act, 1867 or within the definition of a 'federal work, undertaking or business' in the Canada Labour Code.

39. Supra, footnote 11.

> In my view, the only interprovincial undertaking involved here is the Canadian National interprovincial railway. Clearly, a shipper on that railway from one province to another does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking."

Unless it can be concluded that CCPI has an interprovincial work, the Board is not persuaded that the contractual arrangements above-described, in and of themselves, are sufficient to conclude that CCPI is engaged in an interprovincial undertaking of the type contemplated by paragraph 92(10)(a).

5.3 Whether the CCPI Proposed Facility is an Integral Part of the Undertaking of TCPL

The Board has considered this argument, advanced by the Applicant and by parties who supported the Applicant, very carefully. It is the Board's view that, if jurisdiction in respect of the proposed facilities does lie with Parliament and with this Board, it is because the CCPI pipeline is an integral part of an interprovincial undertaking. The Board has assessed the evidence received during the course of the hearing, bearing in mind the "characterization" factors which have been considered by the courts in the cases summarized in Chapter 4, under the "purpose" and "link in the chain" categories.

5.3.1 Physical Location

The proposed 6.2 km of CCPI pipeline and the adjacent measurement facilities will be wholly situate in the province of Ontario; clearly, these proposed facilities will not, of themselves, connect or extend beyond the limits of the province of Ontario and therefore are, prima facie, local works and undertakings. Thus, by virtue of subsection 92(10) of the Constitution Act, 1867, these facilities are within the exclusive jurisdiction of the province of Ontario unless they can be shown to fall within the exception enunciated in paragraph 92(10)(a).

It is a well established principle of law that where a written instrument enunciates a general proposition and then sets forth an exception to it, the onus lies upon the person who claims the benefit of the exception to satisfy a court that he is clearly within it. In this regard, the Board notes the comments of Justice Beetz, albeit in dissent, in respect of the constitutional issue before the Supreme Court, in the Northern Telecom #2 case, at page 779:[40]

> "Because provincial competence is the rule and federal competence is the exception, the onus is on the party who invokes the exception to establish the constitutional facts necessary for the exception to come into play. Failing such a demonstration, exclusive provincial competence must govern."

Parties who advanced the "federal" argument in this case relied on the principle first enunciated in the Luscar Collieries case,[41] and confirmed in later decisions of the Privy Council and Supreme Court and argued, that notwithstanding their physical location, entirely within the province of Ontario, the proposed CCPI facilities, by virtue of their physical, operational and functional connection with the TCPL pipeline system, became a "link in the chain" connecting Ontario with another of the provinces. Parties opposing federal jurisdiction in this case sought to distinguish the Luscar[41] case on its facts. These arguments are considered below in the context of the Board's assessment of the remaining characterization factors.

5.3.2 Ownership/Corporate Organization

Another factor considered by the courts, when characterizing an undertaking as "local" or "interprovincial", is the degree of common ownership of the facilities under consideration. TCPL and CCPI have separate and distinct ownership; their relationship will be governed by a contract negotiated between these two parties at arm's length. The fact that TCPL owns its main transmission lines from Alberta and that CCPI will own the delivery facilities in Ontario is, in the Board's view, not conclusive of provincial jurisdiction over CCPI. The character of an undertaking involving interconnecting systems is not determined by the ownership of any one part. In the Empress Hotel case,[42] the hotel was found to be an undertaking separate and independent

---

40. Supra, footnote 18.
41. Supra, footnote 3.
42. Supra, footnote 22.

the railway undertaking of Canadian Pacific Railway. In the AGT case,[43] the Federal Court of Appeal, confirming the decision of the Federal Court, Trial Division, held that the facilities of AGT were federal notwithstanding that they were entirely situated within the Province of Alberta and notwithstanding the fact that the ownership was different from that of the facilities to which AGT interconnected. Similarly, in the Northern Telecom #1 case,[44] Justice Dickson, speaking for the Supreme Court, at page 134, noted that:

> "In the field of transportation and communication, it is evident that the niceties of corporate organization are not determinative. ... Another, and far more important factor in relating the undertakings, is the physical and operational connection between them."

5.3.3 Physical Connection

The application of CCPI specifically contemplates an order requiring the interconnection of the CCPI facilities with the facilities of TCPL, at the Black Horse station, pursuant to subsection 59(3) of the NEB Act. Parties who argued in favour of federal jurisdiction over the facilities submitted that physical connection between the proposed facilities and the TCPL pipeline system establishes a prima facie case for federal jurisdiction. Parties who argued in favour of provincial jurisdiction over the facilities submitted that there must be, of necessity, some degree of physical connection between an interprovincial pipeline system and the pipelines which distribute natural gas within one province. Therefore, it was argued, little significance should be attached to the fact of physical connection between the two facilities.

The Board is of the view that while physical connection is an important factor in the characterization of an undertaking as local or interprovincial, it is not determinative in and of itself. In the B.C. Electric Railway case,[45] the Privy Council, at page 170, held that:

> "The mere fact that the Central Park Line makes physical connection with two lines of railway under Dominion jurisdiction would not seem to be of itself sufficient to bring the Central Park Line or the portion of it connecting the two federal lines within Dominion jurisdiction."

More than mere physical connection must be established in order that the CCPI pipeline facilities can be characterized as "interprovincial". It is necessary to consider the operational and functional relationship between the facilities of TransCanada and those proposed by CCPI. In the Luscar Collieries case,[46] the Privy Council held that the Luscar line, which physically connected with a line which crossed provincial boundaries, was part of an interprovincial undertaking. In that case, the line was operated by CNR. The significance of common operation is discussed below under the heading "Functional Integration".

5.3.4 Operational Integration

Evidence was received at the hearing in respect of the nature and degree of operational cooperation and coordination between the proposed CCPI facilities and the existing TCPL facility. The Board has examined this evidence very carefully because, in its view, operational and functional integration are key to the characterization of the proposed facilities.

Witnesses for CCPI and TCPL testified about the nature of the physical connection between the TCPL system and the proposed facilities. The proposed interconnecting facilities would include connecting valves which, if closed, would stop the flow of gas into the CCPI line. The valves would be located at the Black Horse Station and would be owned and controlled by TCPL. CCPI does not propose to install any compression facilities in connection with its line. The pressure in the CCPI line would depend on the pressure in the TCPL line. It was argued that the ability of TCPL to deliver gas to CCPI at the Black Horse Station depends, to some extent, on the pressure in the TCPL line. It also was argued that the operation of the CCPI line would have some impact on the pressure in the TCPL line.

Considerable evidence was received during the course of the hearing in respect of the nomination procedure; details are given in Chapter 2. TCPL testified that should CCPI take delivery of a volume of gas at the Black Horse Station in

---

43. Supra, footnote 5.
44. Supra, footnote 18.
45. Supra, footnote 7.
46. Supra, footnote 3.

Ontario, greater than the nominated volume delivered at Empress, Alberta, TCPL's line pack would be depleted, line pressure would fall, and there could be a loss of capacity and efficiency. Below a certain minimum line pack level, TCPL would be unable to meet the requirements of CCPI and of its other customers and would be required to curtail deliveries of interruptible gas. The evidence also indicates that, should CCPI take less than its nominated volume of gas, opportunities for interruptible deliveries to other TCPL customers could be lost because pipeline capacity reserved for CCPI would not, in those circumstances, be used. TCPL's tariff provides for the imposition of financial penalties in circumstances where CCPI takes more or less than its nominated volume of gas. It was argued that those penalties indicate the high degree to which the CCPI pipeline and TCPL system are operationally integrated.

The Board is not convinced that the degree of operational integration which will exist between CCPI and TCPL is sufficient to consider the two pipelines as one, indivisible pipeline system. CCPI's operation would not be under the care, control or direction of TCPL; the converse is also true. The CCPI facilities would not significantly affect the operation of the TCPL line. Operational integration must, in the Board's view, involve more than mere cooperation and agreement with respect to daily deliveries of gas. In this regard, the Board notes the excerpt from an article entitled "The Federal Case", which was referred to by CCPI's counsel during his final argument. That article noted that there are vital differences between the features of railways and pipelines because, in the case of pipelines, once there is a physical connection, coordinated management and control follow as a matter of course. No doubt, counsel for CCPI intended this article to support his submission that the centralized and coordinated operations, common to any system of interconnecting pipelines, is indicative, in this case, of the high degree of operational integration which will be required as between TCPL and the proposed CCPI facilities. In the Board's view, the very nature of gas transmission facilities dictates that there be cooperation and coordination between interconnecting lines. This, in and of itself, is not determinative.

5.3.5 Functional Integration

It appears to the Board that the characterization of an undertaking involves answering a fundamental question: what is the undertaking which is in fact being carried on; is there one undertaking or are there two? This question has been posed, in one form or another, in many of the cases which involved the characterization of an undertaking as "local" or "interprovincial" and was first asked by the Privy Council in respect of a bus service in the Winner case.[47] In the AGT case,[48] Madam Justice Reed, at page 175, noted that "the crucial feature then is the nature of the enterprise itself, not the physical equipment it uses". In the Dionne case,[49] the Supreme Court referred to a "functionally inter-related system". When courts refer to the "essential nature" or to the degree of "functional integration" of an undertaking, what they have really considered is the overall purpose or function of the undertaking.

Parties who argued in favour of provincial jurisdiction in this case submitted that the purpose of the CCPI facilities was simply to transport natural gas between two points within Ontario. Analogy was made between the proposed CCPI facilities and other gas distribution systems in Ontario which buy system gas from TransCanada and then distribute that gas to industrial, commercial and residential users within Ontario. The purpose of these gas distribution systems was contrasted with the TCPL system, whose purpose, it was submitted, is to transport natural gas from the western producing provinces to eastern Canada. It was submitted that the fact that CCPI purchased its gas in Alberta and that, unlike provincial gas distributors, it did not rely on system gas, was irrelevant in respect of the characterization of the CCPI facilities.

Parties who advanced the federal argument suggested that the true purpose of the CCPI facility was to complete the direct and continuous interprovincial transmission of natural gas, purchased by CCPI in Alberta, to the proposed terminus of the CCPI pipeline in Welland, Ontario. It was argued that the CCPI line was essential in order to effect that purpose and that the TCPL and CCPI pipeline systems would form an integral, indivisible and necessarily cooperative whole for the direct and continuous flow of natural gas from Alberta to the Cyanamid plant.

---

47. Supra, footnote 9.

48. Supra, footnote 5.

49. Supra, footnote 38.

In examining what overall purpose the proposed facilities would serve, reference must be made to three important cases: the Luscar Collieries case,[50] the Capital Cities case[51] and the Dionne case.[52] The facts in these cases have been set out in Chapter 4 and there is no need to restate them here. In the Board's view, these cases are important because they closely parallel the facts before the Board in this case.

Parties who argued that the CCPI facilities would be a "local" work or undertaking made much of the fact that these facilities would be operated by CCPI and not by TCPL, the operator of an existing interprovincial undertaking. It was submitted that in the Luscar case,[50] unlike in the case now before the Board, the line in question was operated, pursuant to certain agreements, by CNR, which also operated a railway system extending from British Columbia to the rest of Canada.

In the Board's view, the mere fact that the Luscar line was operated by CNR is not significant in and of itself. What is important is the fact that, by virtue of such operation, the Luscar line became an upstream "link in a chain", which chain enabled traffic to pass to such parts of Canada as were served by the CNR system. The Luscar line itself was, in essence, a work whose purpose was to, inter alia, facilitate interprovincial traffic. In the present case, common operational agreements, as between TCPL and CCPI, are not required to enable traffic to pass over the TCPL system, through the CCPI system, to the ultimate consumer. TCPL is required, by virtue of orders issued by the Board, pursuant to subsection 59(2) of the NEB Act, to transport and deliver gas offered by CCPI over the TCPL system to the point of connection with the proposed CCPI line. It is clear, therefore, that even without common operation as between CCPI and TCPL, the CCPI line is, as the Luscar line was, a "link in a chain", albeit a downstream link, which chain facilitates the direct and continuous interprovincial transmission of gas from its point of origin in Alberta to the Welland plant gate.

The Capital Cities[51] and Dionne[52] decisions relied on the "link in the chain" analogy as well. These cases involved the distribution by cable of "off-air" signals, which signals originated outside the province but which were received within the province and then distributed to an end-user. In both of these cases, the Supreme Court emphasized that the Court was not deciding which level of government had jurisdiction over "local programs". The distinction between "local programs" and "off-air" programs is that the local programs are not received by the head-end as broadcast signals. So far as "local programs" are concerned, the cable system cannot be characterized as a "conduit for signals from a telecast" and does not constitute a "link in the chain" of transmission from the transmitter to the end-user as is the case with "off-air" signals.

In the Board's view, the purpose served by the proposed CCPI facilities is no different than the purpose served by the transmission cables in the Capital Cities[51] and Dionne[52] cases. In both examples, a product (gas in the case of Cyanamid, a broadcast signal in the case of Capital Cities[51] and Dionne[52]) is transmitted into a province where it is picked up by a distribution system (a pipeline in the case of CCPI and a cable system in the case of Capital Cities[51] and Dionne[52]) and delivered to an end-user (a manufacturing plant in the case of CCPI and a cable subscriber in the case of Capital Cities[51] and Dionne[52]). Both the cable system and the CCPI pipeline are dependent on the extraprovincial supply of a product. Neither delivery system, however, is necessary to the receipt, by end-users, of that product. Broadcast signals can be received directly by an antenna. Similarly, gas transported by TCPL to the Black Horse Station can be delivered to the Welland plant by means of an existing pipeline system. As well, in both instances, the consumers of the product are all located within one province; both the cable system and the proposed CCPI pipeline have a local character.

Despite the recognition of "local" characteristics, the Supreme Court, in both the Capital Cities[51] and the Dionne[52] cases, refused to sever the cable component from the transmission and receiver portions of the broadcasting system. Chief Justice Laskin, speaking for the majority of the Supreme Court of Canada in Capital Cities,[51] noted at page 621:

> "I am unable to accept the submission of the appellants and of the Attorneys-General supporting them that a demarcation can be

---

50. Supra, footnote 3.

51. Supra, footnote 6.

52. Supra, footnote 38.

made for legislative purposes at the point where the cable distribution systems receive the Hertzian waves. The systems are clearly undertakings which reach out beyond the Province in which their physical apparatus is located; and, even more than in the Winner case, they each constitute a single undertaking which deals with the very signals which come to each of them from across the border and transmit these signals, albeit through a conversion process, through its cable system to subscribers ... The fallacy in the contention on behalf of the Attorney-General of Ontario and of the Attorney-General of Quebec and of British Columbia, and, indeed, of the appellants, is in their reliance on the technology of transmission as a ground for shifting constitutional competence when the entire undertaking relates to and is dependent on extraprovincial signals which the cable system receives and sends on to subscribers ... The system depends upon a telecast for its operation, and is no more than a conduit for signals from the telecast, interposing itself through a different technology to bring the telecast to paying subscribers."

In coming to its decision in Capital Cities,[53] the Supreme Court relied on, inter alia, the decision in the Winner case.[54] Reference to the Winner case[54] suggests to the Board that the Supreme Court drew parallels between the test that should be used for transportation cases and that which should be used in communication cases, where such cases involve a characterization pursuant to paragraph 92(10)(a) of the Constitution Act, 1867.

The Board recognizes that it is not bound by the decisions in the Luscar,[55] Capital Cities[53] and the Dionne[56] cases; however, given the similarities between the facts before the Board in this case and the facts before the Court in Luscar,[55] Capital Cities[53] and Dionne,[56] the Board is of the view that it must be guided by the reasoning set out in those three decisions.

The Board has considered whether these cases can be distinguished in any aspect. It is recognized that the Supreme Court, in reaching its decision in the Capital Cities case,[53] was concerned not only with the nature and extent of the physical facilities involved but also with the content of the signals carried. In that case, Chief Justice Laskin, at page 623, notes:

"Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise."

The Board understands this to mean that if a transportation or transmission work and undertaking is found to fall under paragraph 92(10)(a) of the Constitution Act, 1867, Parliament has jurisdiction over both the physical facilities and the content of what is transported or transmitted and that the Court was not relying on any other section of the Constitution Act, 1867 with respect to jurisdiction over content.

The Board is of the view that for any pipelines over which it exercises the jurisdiction delegated by Parliament, it also regulates content and therefore cannot distinguish either the Capital Cities[53] or Dionne[56] cases on the basis of a difference in jurisdiction respecting content of that which is transported or transmitted.

Although the CCPI facility will be located entirely within the Province of Ontario, the Board cannot but conclude that these facilities will indeed form a downstream "link in a chain" which chain will facilitate the interprovincial transmission of gas from Alberta to the Welland plant. The fact that the Consumers' facilities currently serve the same purpose as the facilities proposed by the Applicant is, in the Board's view, immaterial to the characterization of the proposed facilities themselves.

5.3.6 Conclusion

The Board finds that the proposed facilities of CCPI are within the legislative authority of Parliament pursuant to subsection 91(29) and paragraph 92(10)(a) of the Constitution Act, 1867. In reaching this conclusion, the Board notes that while none of the characterization factors discussed above were, in and of themselves,

---

53. Supra, footnote 6.

54. Supra, footnote 9.

55. Supra, footnote 3.

56. Supra, footnote 38.

sufficient to attract federal jurisdiction to the CCPI facilities, their combined effect persuades the Board that jurisdiction properly lies with Parliament.

5.4 Whether the Regulation of the CCPI Pipeline is Within Parliaments's Power to Regulate Trade and Commerce

In as much as the Board has concluded that the proposed facilities are within the legislative authority of Parliament, pursuant to subsection 91(29) and paragraph 92(10)(a) of the Constitution Act, 1867, it does not find it necessary to consider the trade and commerce argument.

5.5 Jurisdiction of the Board

The Board finds that the proposed CCPI facilities constitute a pipeline within the meaning of Section 2 of the NEB Act and are, for this reason, under the jurisdiction of the Board. Section 2 of the NEB Act defines "pipeline" as:

> "a line for the transmission of gas or oil connecting a province with any other or others of the provinces, or extending beyond the limits of a province or the offshore area as defined in section 87, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property and works connected therewith;"

The definition of pipeline "tracks" the wording in paragraph 92(10)(a) of the Constitution Act, 1867. The Board has found that the proposed CCPI facilities are part of an interprovincial undertaking connecting a province with any other or others of the provinces and fall within the exception enuciated in paragraph 92(10)(a). It follows, therefore, that the facilities also constitute a pipeline within the meaning of Section 2 of the NEB Act.

Chapter 6
Evidence Pertaining to the Merits of the Application

The CCPI project involves the construction of a 6.2 km, 219 mm O.D. pipeline from the TCPL Black Horse Meter Station to the Cyanamid plant (see Appendix II). The upgrading of an existing natural gas measurement station within the Cyanamid plant, to allow it to accept the increased delivery pressure from the CCPI line, would be incorporated into the project at its downstream terminus. CCPI estimates that the pipeline would take 15 days to construct and would cost $890,000.

This cost estimate includes a provision for the reimbursement of TCPL's capital costs that would be incurred in order to connect the TCPL system to the CCPI pipeline. If ordered to provide the connection, TCPL would modify its Black Horse Meter Station by converting an existing 323 mm O.D. meter run to a 219 mm O.D. meter run. This new meter run would be connected to the CCPI line, at the TCPL property line, via a 168 mm O.D. connecting pipeline (see Appendix III). TCPL would also install a 168 mm O.D. connection to its station bypass line. TransCanada estimated that final design and construction would take 12-14 weeks and would cost approximately $115,000.

The route that the CCPI pipeline would follow is across lands which are zoned agricultural. Ninety percent of the proposed route is located on Ontario Hydro-held fee-simple lands and right-of-way. The remainder of the route is across municipal road allowances or Cyanamid's property. With respect to the Ontario Hydro right-of-way portion of the route, the property of six private landowners would be crossed. Each of these landowners had been served with a Notice of Acquisition, pursuant to subsection 75.1 of the Act, prior to the close of the hearing. CCPI indicated that it expected to obtain signed option agreements from all of the owners subsequent to the hearing. However, the record does not indicate whether those agreements have been secured.

CCPI's environmental studies were performed in consultation with provincial authorities. The results indicate that the pipeline route would not affect any known palaeontological, archaeological, historic, or controlled areas. Neither would the pipeline cross areas with unique or sensitive species of fauna, wildlife areas, or areas containing perennial watercourses or wetlands. One intermittent wetland area is located on the pipeline route on the property of Cyanamid's Welland plant. CCPI indicated that it would install the pipeline across this sensitive area during periods when it would be dry. CCPI undertook to confine all work to the acquired right-of-way and to employ recognized environmental protection procedures including topsoil stripping, construction shut-down during extreme wet conditions, chisel ploughing of the subsoil, and discing and harrowing of the replaced topsoil. CCPI also undertook to seed and fertilize its right-of-way where requested by the landowner. Finally, CCPI undertook to restore the right-of-way to the original condition, insofar as practicable.

CCPI indicated that Cyanamid had entered into a gas purchase agreement with Canadian Worldwide Energy Limited to purchase, on average, 650 000 m^3 (approximately 24 290 GJ) of natural gas per day. Purchase and resale arrangements are in place with the Alberta Petroleum Marketing Commission and Cyanamid is authorized to remove up to 475 726 000 m^3 (approximately 17 798 000 GJ) of natural gas from Alberta pursuant to Alberta Energy Resources Conservation Board (AERCB) Removal Permit CC85-1A. It was evident, therefore, that short-term gas supply for the project had been secured and that the required removal permit had been obtained.

The evidence indicates that Cyanamid currently pays a toll of approximately $0.246/GJ to

Consumers' for transportation service from the Black Horse Station to the plant. This is an interim toll and is subject to a final ruling from the OEB (E.B.R.O. 414). Consumers' witnesses indicated that a variety of services are provided with payment of the interim toll, including load balancing, access to backstop supply, dispatching, and gas acquisition. The evidence of Ontario emphasized that the unbundling of these services was to be one of the subjects to be addressed at an OEB hearing commencing on 22 September 1986 (E.B.R.O. 410).

The cost incurred by Cyanamid for transportation service on the Consumers' system was compared to the costs for the CCPI bypass, the latter having been estimated during the course of the hearing to be between $0.057/GJ and $0.066/GJ. This approximation was based on an estimated annual operating cost of $39,500, an estimated annual debt-servicing cost of $100,000 (assuming interest at 10 percent on capital costs of $1,000,000), and an estimated annual depreciation charge of $70,000 (assuming a depreciation rate of 7 percent per year). These costs amounted to approximately $0.024/GJ which represents the unit cost of service at 100 percent load factor. In order to accommodate the variations in demand that could be anticipated, costs of between $0.028/GJ and $0.038/GJ, and $0.005/GJ were added, respectively, to provide for the cost of gas storage by Union Gas Limited (Union) and a storage transportation service (STS) charge on TCPL. CCPI's witnesses testified that, although these unit costs were only approximate, they provided a fair estimate of the cost to obtain services comparable to those currently provided by Consumers'. Consumers' challenged this submission and argued that those cost estimates represented the bare minimum of what it would cost to duplicate the services that it currently provides to Cyanamid. In particular, they noted that any reduction from operation at 100 percent load factor on the TCPL or NOVA systems would increase the unit costs for transportation on those pipelines. CCPI's witnesses conceded that, in the absence of the load balancing services currently offered by Consumers', some reduction in the load factor was possible. Consumers' questioned the availability of storage space on the Union system and the availability of STS from TCPL.

Table 6-1 and the notes accompanying it set out Cyanamid's approximate gas costs, with and without the CCPI bypass, relative to its gas costs at the time of the original application.

In addition to Cyanamid's private interest, an assessment of the public interest in this matter must take into account the effect of the bypass on Consumers' and its users. Under the current transportation service arrangements, Consumers' collects approximately $2,000,000 per year in revenue from Cyanamid. Were Consumers' to lose this revenue due to the bypass (or closure of the plant), then its shareholders, its remaining tollpayers, or both together would have to absorb Consumers' unrecovered revenue. The evidence indicated that, if the unrecovered revenue were equally distributed among all of Consumers' rate classes, a unit rate increase of approximately $0.0066/GJ would be necessary. However, if recovery of the lost revenue due to the CCPI bypass were to be contained within Cyanamid's current rate classes, the firm unit rate (for class 110) would increase by $0.25/GJ and the interruptible unit rate (for class 145) would increase by $0.0066/GJ. Consumers' estimated that there were 25 potential bypass customers on its system with a total annual load capability of 33,900,000 GJ. Consumers' estimated that, if it lost this entire potential bypass load, its rates (all rate classes) would increase by at least $0.026/GJ.

Consumers' gave evidence in respect of the potential impact of the "domino theory" or "death spiral" that could result if and as customers left the system. The theory is that, as a utility loses business due to bypasses, the unit cost of service to the remainder increases so that they too seek bypasses or fuel conversion and so on. Consumers' expressed particular concern about the potential loss of interruptible customers who contribute to system load balancing and the resultant expense of providing alternative load balancing capability. Ontario submitted a report prepared for the OEB by Industrial Economics Incorporated in which the impact of potential bypasses on Consumers' was addressed. At page 55 of that report, it is stated that: "... the large volume of sales to residential, commercial and small industrial customers relative to potential bypass volumes insulates the customers of Consumers' from major rate increases." Furthermore, it was suggested by CCPI that the rate at which Consumers' was adding new customers and new load would very quickly mitigate the effects of load loss due to the CCPI bypass.

With respect to the possibility of the shareholders bearing some of the unrecovered revenue, Consumers' noted that the increased business

risk that would result from such a decision would ultimately work its way into the rates in the form of a higher cost for capital.

On the broad subject of deregulation, interested parties made reference to the Natural Gas Agreement dated 31 October 1985, the statement on the Agreement on Natural Gas Pricing and Markets which was made by the Minister of Energy for Ontario on 3 December 1985, and the report of the Pipeline Review Panel dated 10 July 1986.

Table 6-1
Summary of Cyanamid Gas Purchase Costs

($/GJ)

Cost Components	Notes	Charges and Tolls 3 October 1985	Cyanamid's Present Gas Costs Without CCPI	With CCPI
1. Alberta Border				
-Regulated border price		2.80	---	---
-Gas purchase price	(1.)	---	1.85	1.85
2. TCPL	(2.)	0.98	0.98	0.98
3. Consumers' -Transportation component of the purchase price	(3.)	0.20	---	---
-T-service (firm and interruptible)	(4.)	---	0.246	---
4. CCPI	(5.)	---	---	0.066
5. Totals		3.98	3.08	2.90
6. Percent decrease from 3 October 1985		---	22.7	27.2

Notes

(1) A CCPI witness estimated a saving of about $1.00/Mcf ($0.95/GJ) by going to a direct purchase. Therefore, the $1.85/GJ was calculated by subtracting $0.95 from the border price. Out of the fee paid to the producer, it pays $0.14/GJ to get the gas from the wellhead to the NOVA system and $0.25/GJ to transport the gas on the NOVA system to the Alberta border. (The latter is the value for the current 12 month rolling average. The (variable) toll for July 1986 was $0.30/GJ). Testimony on behalf of a CCPI witness indicated that, generally, producers have offered to indemnify purchasers for the "double" demand charge of $0.75/GJ. Since the hearing, the Federal Court has upheld the Board's decision to terminate double demand charges. A witness for CCPI noted that, were it not for the necessity for this indemnity by the producer, it would expect that the purchase price would be lower. He also indicated that the bypass project (with CCPI) would avoid payments for double demand.

(2) The 1985 toll is $1.10/GJ. The Transportation Assistance Program (TAP II) subsidy reduces the effective transportation charge to the 1984 toll of $0.98/GJ. The rate of $0.98/GJ for "With CCPI" is optimistic in that it assumes deliveries at 100 percent load factor. A drop (for whatever reason) to 80 percent load factor would add another $0.23/GJ to this rate.

(3) These gas transportation charges of Consumers' were estimated by CCPI in its original application.

(4) These rates are interim and are a blend of firm and interruptible transportation rates. In addition to transportation, Consumers' also provides load balancing (and other services are available).

(5) This rate was estimated to be $0.057 to $0.066/GJ based on the estimated costs for the pipeline ($0.024/GJ), storage by Union ($0.028 to $0.038/GJ), and an STS charge on TCPL ($0.005/GJ).

Chapter 7
Views of the Board - Merits

7.1 Introduction

The unique feature of the CCPI application is that it would duplicate the Consumers' facilities already in place. Implementation of the CCPI project would render a substantial portion of the capacity of the parallel Consumers' facilities redundant and could potentially impose a redistribution of associated Consumers' revenue requirements amongst its users. In the Board's view, the merits of this application turn on the issues of economic efficiency, fairness and equity, and the question of the appropriate role for regulation in the economy. Those issues warrant special consideration and the balance of this chapter addresses each of them in turn.

7.2 Economic Efficiency

From the private perspective, given the current Consumers' rates, the construction of a bypass is clearly profitable. Cyanamid estimates that the bypass will reduce its unit costs of transportation from TCPL's Black Horse Station to the Welland plant from $0.246/GJ to approximately $0.066/GJ. No intervenor disputed that this would be a profitable undertaking for Cyanamid although it was suggested that Cyanamid may not have exhausted all possible avenues for obtaining a reduction in Consumers' rates. If those rates were reduced to CCPI's unit costs, or lower, the investment would no longer be profitable and, therefore, CCPI presumably would not construct the bypass. It is noted, however, that CCPI's witness maintained that they may construct the bypass even if Consumers' rates were reduced.

Other things being equal, it is in the public interest to use scarce resources efficiently (i.e. to maximize the value of output). Thus, from an overall Canadian public interest perspective, the important questions are:

(i) whether it is necessary to use resources to contruct a bypass in order to reduce gas costs, and

(ii) with reduced gas costs to Cyanamid, and therefore reduced production costs, would there be a sufficient increase in Cyanamid's output?

If we assume that Consumers' rates to Cyanamid remain fixed, it would be reasonable to expect the bypass to cause an increase in Cyanamid's output. This flows from the fact that the bypass would reduce Cyanamid's gas costs and natural gas is a significant input to Cyanamid's production. If costs were reduced, Cyanamid's output should increase at least over the longer term. If the net benefits derived from Cyanamid's increased output were greater than the sum of the required investment and any decrease in net benefits that would result from increases in rates to Consumers' other customers, as a consequence of losing Cyanamid's load, then the bypass would be efficient. CCPI's witness, however, did not establish that the bypass, in and of itself, would increase the plant's production or extend its operating life. Therefore, constructing the bypass may be inefficient. A more efficient use of resources would result from a reduction in the Consumers' rate charged to Cyanamid. Such a rate reduction would require less of an increase in rates to Consumers' other customers than if the Cyanamid load were lost because of the bypass. Furthermore, it would not require an investment in new facilities.

Even though the circumstances of this case make the bypass privately profitable, the duplication of facilities without the demonstration of a sufficient increase in pipeline throughput or plant output, lead the Board to conclude that the bypass would likely be inefficient from a Canadian public interest point of view.

7.3 Fairness and Equity

There are two conflicting perspectives on the fairness and equity issue: Cyanamid's and that of Consumers' and its customers.

From Cyanamid's perspective:

- Cyanamid is required to pay a rate in excess of what it would cost to provide the service itself or what it would seem to cost Consumers' to provide the service; and

- if Cyanamid had the ability to use another fuel for feedstock, then market forces could not be suppressed by OEB/NEB regulation; i.e. customers with dual fuel capability can react to market forces by switching fuels, effectively bypassing Consumers', without regulatory authorization.

From the perspective of Consumers' and its customers, if the bypass were approved:

- the loss of the Cyanamid load would increase rates for Consumers' remaining customers; and

- Cyanamid would no longer be paying a contribution margin on facilities built to meet its needs.

It is necessary to balance Cyanamid's interests against those of other natural gas consumers. In this regard, the Board notes that the impact on Consumers' rates of losing Cyanamid's load could be a relatively insignificant $0.007/GJ. Furthermore, the Board notes that the facilities serving Cyanamid were initially constructed in 1959 and 1966 and were estimated by Consumers' to have a net plant value of $303,000 at 30 September 1986. In contrast, Cyanamid pays $2,000,000 per year for Consumers' transportation service under the current arrangement.

All things considered, it appears to the Board that the balance leans in favour of Cyanamid.

7.4 Regulation and the Role of the Market

A bypass would be efficient if the new pipeline system could transport gas more cheaply than the existing system; i.e. what is relevant from a public interest perspective is not the rates charged by Consumers' but the actual costs to Consumers' of providing the service. In Cyanamid's case, as described above, the bypass is profitable from the private perspective but not the overall public perspective, because regulatory intervention has driven a wedge between the signals provided to the market by Consumers' rates and the true economic costs involved.

A society's scarce resources will be used efficiently when individual decision-makers base their production and consumption decisions on prices which reflect the true economic costs of using resources. The rationale is that producers will seek to minimize their costs to remain competitive and, if prices reflect the economic costs of using the resources, decisions based on those decisions will lead to an economically efficient use of the available resources. Conversely, if prices do not reflect costs, decisions based on those prices do not result in an efficient use of resources. Thus, from a purely economic perspective, Consumers' current rates result in an inefficient use of natural gas.

The Cyanamid bypass is the market's response to Consumers' rates. In this case, the market is signalling that Consumers' rates are not consistent with economic reality. Market forces are pressing for a change in Consumers' rates. If this change does not occur and the market is allowed to operate freely, not only Cyanamid's but other bypasses may be proposed, potentially leading to load loss for Consumers' and possibly the much discussed "death spiral".

7.5 Conclusions

The Board finds that the balance of the public interest lies in CCPI's favour. The Board comes to this conclusion recognizing that installation of the bypass, should it actually occur, could result in something less than an optimum use of resources. But outweighing this consideration in the Board's view, is the need to allow market signals to flow through to the OEB and Consumers'. If the Board were not to approve the bypass, it would be suppressing these market signals. While not making any judgement on what should result from the flow through of such signals, the Board is of the view that the CCPI bypass is in the public interest in the current circumstances of the move to market sensitive gas pricing.

Chapter 8
Disposition

As set out in the previous chapters of these Reasons for Decision, the Board examined all of the evidence and took into account all matters that appeared to it to be relevant. The Board has found that it has the jurisdiction, pursuant to the Constitution Act, 1867 and the NEB Act, to consider and rule on this application by CCPI.

Concerning the merits of CCPI's proposed bypass, the Board is confident that the project is both technically and environmentally feasible and that there are suitable short-term arrangements in place for gas supply. However, the Board believes that it is in the public interest that scarce resources be used efficiently and therefore, generally, is not favourably disposed to proposals which duplicate existing facilities. The most efficient use of resources in this instance would occur if parties reacted to this application in a way that made the CCPI project privately unprofitable because of appropriate adjustments to rates for the use of the facilities already in place.

However, taking into account all matters relevant to the circumstances of this case, the Board has concluded that the message embodied in the CCPI application, from the market to the parties concerned, should not be impeded. Therefore, the Board finds that the project is in the public interest and has decided to grant exemptions from Sections 26(1)(a), 26(2), 27, and 28 of the Act. Board Order XG-13-86 and the associated terms and conditions are set out in Appendix IV.

In addition to complying with the Board's standard technical and environmental requirements, CCPI is also required, pursuant to condition 1 of the order, to file certain technical information with the Board prior to the commencement of construction. If the Applicant is unable to submit option agreements signed by affected private landowners, a formal review of the pipeline route, requiring Board approval, will be held prior to the commencment of construction, pursuant to condition 2. In that case, the Applicant would be required to submit plans, profiles and books of reference for the pipeline and the Board would adopt the procedures set out in Sections 29.1 to 29.6 of the Act for the formal review process. As is the Board's standard practice, the Applicant is not exempted from the requirements of Sections 26(1)(b) and 38 of the Act. The facilities will be required to comply with the Board's leave-to-open requirements.

The approval of CCPI's Section 49 application by the Board would have no significance if the Board were not prepared to order TCPL to connect its system to the CCPI pipeline. The Board finds that the pipeline interconnection is in the public interest and that no undue burden would be placed on TCPL, if ordered to provide the interconnection. Accordingly, the Board has decided to order TCPL to connect its system to the CCPI pipeline, pursuant to Section 59(3) of the Act. Board Order MO-63-86 is set out in Appendix V.

The foregoing, together with Board Orders, XG-13-86 and MO-63-86 constitute our Reasons for Decision and our Decisions in this matter.

R.F. Brooks
Presiding Member

A.D. Hunt
Member

J.R. Jenkins
Member

Appendix I

GH-3-86
Directions on Procedure
Cyanamid Canada Pipeline Inc.
Application for Orders to
Construct Natural Gas Pipeline Facilities

By application dated 3 October 1985, Cyanamid Canada Pipeline Inc. ("the Applicant") applied to the National Energy Board ("the Board") for, inter alia, an Order, pursuant to Section 49 of the National Energy Board Act (the "Act"), exempting the Applicant from certain sections of the Act, which would have the effect of authorizing the construction and operation of certain natural gas pipeline facilities. The application also seeks an Order, pursuant to Section 59(3) of the Act, directing TransCanada PipeLines Limited (TransCanada) to construct interconnecting facilities between its pipeline system and that of the Applicant at TransCanada's Black Horse Station.

Having considered the application and having considered comments from the Minister of Energy for Ontario, the Consumers' Gas Company Ltd. and TransCanada, the Board has, on 11 July 1986, decided to hold a public hearing and directs as follows:

Public Viewing

1. The Applicant shall deposit and keep on file, for public inspection during normal business hours, a copy of the application in its offices at 2225 Sheppard Avenue East, Willowdale, Ontario, M2J 4Y5. A copy of the application is also available for viewing during normal business hours in the Board's Library, Room 962, 473 Albert Street, Ottawa, Ontario, K1A 0E5 and at the Board's Calgary office, 4500-16th Avenue, N.W., Calgary, Alberta, T3B 0M6.

Interventions and Letters of Comment

2. Interventions and letters of comment are required to be filed with the Secretary and served on the Applicant by 25 July 1986.

3. The Secretary will issue a list of intervenors shortly after 25 July 1986.

Information Requests

4. Information requests addressed to the Applicant shall be filed with the Secretary and served on all other parties to the proceeding by 7 August 1986.

5. The Applicant's response shall be filed with the Secretary and served on all other parties to the proceeding by 15 August 1986.

6. Information requests addressed to intervenors shall be filed with the Secretary and served on all other parties to the proceeding by 15 August 1986.

7. Intervenors' responses shall be filed with the Secretary and served on all other parties to the proceeding by 22 August 1986.

Written Evidence

8. Written evidence that the Applicant wishes to present shall be filed with the Secretary and served on all other parties to the proceeding by 30 July 1986.

9. Written evidence of intervenors is required to be filed with the Secretary and served on all other parties to the proceeding by 7 August 1986.

10. Parties who intend to present argument in respect of the Board's jurisdiction over the

proposed facilities shall file with the Secretary and serve on all interested parties, by 15 August 1986, a brief of legal authorities and a statement of the applicable legal principles in respect of this issue.

11. Parties should indicate how they intend to group their witnesses into Panels at the time they file their written evidence.

12. The Secretary shall issue the order of appearance of parties for purpose of cross examination and the order of appearance of witnesses by 15 August 1986.

Hearing

13. The public hearing will commence in the Hearing Room of the National Energy Board, 473 Albert Street, Ottawa, Ontario on Monday, 25 August 1986 at 1:30 p.m.

Service to Parties

14. The Applicant shall serve one copy of these Directions on Procedure and the Notice of Public Hearing attached as Appendix I forthwith on the parties listed in Appendix II.

Notice of Hearing

15. The Board has caused a Notice of Public Hearing to be published in the publications listed in Appendix III.

Filing and Service Requirements

16. Where parties are directed by these Directions on Procedure or by the NEB Rules of Practice and Procedure to file or serve documents on other parties, the following number of copies shall be served or filed.

    (i) for documents to be filed with the Board, provide 35 copies;
    (ii) for documents to be served on the Applicant, provide 3 copies;
    (iii) for documents to be served on intervenors, provide 1 copy.

17. Parties filing or serving documents at the hearing shall file or serve the number of copies specified in the preceding paragraph.

18. Persons filing letters of comment should serve one copy on the Applicant and file one copy with the Board which in turn will provide copies for all other parties.

19. Parties filing or serving fewer than three days prior to the commencement of the hearing shall also bring to the hearing a sufficient number of copies of the documents for use by the Board and other parties present at the hearing.

Simultaneous Interpretation

20. Simultaneous interpretation will be provided at this proceeding if requested by any party. In order to facilitate the arrangement of this service, parties are asked to advise the Board by 25 July 1986 in this regard.

General

21. All parties are asked to quote No. GH-3-86 when corresponding with the Board in this matter.

22. These Directions supplement the NEB Rules of Practice and Procedure.

J.S. Klenavic
Secretary

Appendix I
To Order GH-3-86

NATIONAL ENERGY BOARD
NOTICE OF PUBLIC HEARING
Cyanamid Canada Pipeline Inc.
Application for Orders to Construct
Natural Gas Pipeline Facilities

The National Energy Board will hold a hearing to consider an application dated 3 October 1985 from Cyanamid Canada Pipeline Inc. to construct and operate a six-kilometre pipeline in southern Ontario and to interconnect it with that of TransCanada PipeLines Limited. The pipeline, 219 millimetres in diameter and costing $770,000, would extend from TransCanada's pipeline at Black Horse Station to Cyanamid's ammonia plant in Welland, Ontario. This pipeline would provide the plant with an alternative means of

transportation to the service currently being provided by the local distributor, The Consumers' Gas Company Ltd., which is under provincial regulatory jurisdiction.

The hearing will commence on Monday, 25 August 1986 at 1:30 p.m. local time in the Board's hearing room, 473 Albert Street, Ottawa, Ontario.

The hearing will be public and will be held to obtain the evidence and relevant views of interested parties, groups, organizations and companies on the application and on whether the Board has jurisdiction to rule on the application.

Anyone wishing to intervene in the hearing should advise the Board by writing to the Secretary of the Board and by writing to the Applicant. The Applicant is required to provide a copy of the application to each intervenor.

Anyone wishing to provide comments only on the application should write to the Secretary of the Board and send a copy to the Applicant at 2255 Sheppard Avenue East, Willowdale, Ontario, M2J 4Y5 and on Mr. C. Kemm Yates, Messrs. Fenerty, Robertson, Fraser & Hatch, Barristers and Solicitors, 2900, 700 Ninth Avenue S.W., Calgary, Alberta, T2P 4A7.

The deadline for receipt of either written notices of intention to intervene or comments is 25 July 1986. The Secretary will then issue a list of intervenors.

Information on the procedures for this hearing (Reference Number: GH-3-86) or the NEB Rules of Practice and Procedure governing all hearings (both documents available in English and French) may be obtained by writing to the Secretary or telephoning the Board's Regulatory Support Office at (613)998-7206.

J.S. Klenavic
Secretary
National Energy Board
473 Albert Street
Ottawa, Ontario
K1A 0E5

14 July 1986

Appendix II
To Order GH-3-86

Attorney General of Alberta
c/o Mr. Geoffrey Ho
Senior Solicitor
Department of Energy & Natural Resources
10th Floor - South Tower
Petroleum Plaza
9915 - 108th Street
Edmonton, Alberta
T5K 2C9

Attorney General of the Province of Saskatchewan
Legislative Buildings
Regina, Saskatchewan
S4S 0B3

Attorney General of the Province of Manitoba
9th Floor
405 Broadway Avenue
Winnipeg, Manitoba
R3C 3L6

Attorney General of the Province of Ontario
18 King Street East
Toronto, Ontario
M5C 1C5

and

John M. Johnson, Q.C.
Director, Legal Services Group
Ministry of Energy for Ontario
12th Floor
56 Wellesley Street West
Toronto, Ontario
M7A 2B7

Procureur général de la province de Québec
Édifice Delta
1200, route de l'Église
Ste-Foy (Québec)
G1R 4X7

and

Me Jean Giroux, avocat
Service juridique du Ministère de l'énergie et des ressources de la province de Québec
200B, Chemin Ste-Foy
Québec (Québec)
G1R 4X7

Attorney General of the Province of British Columbia
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Mr. Ronald S. Lougheed
Senior Vice-President, Gas Supply
The Consumers' Gas Company Ltd.
100 Simcoe Street
Toronto, Ontario
M5H 3G2

and

Smith, Lyons, Torrance, Stevenson & Mayer
Barristers & Solicitors
Suite 3400
The Exchange Tower
P.O. Box 420
2 First Canadian Place
Toronto, Ontario
M5X 1J3
Att. Mr. J. Farrell

J.W.S. McOuat, Q.C.
Vice-President, Law
TransCanada PipeLines Limited
P.O. Box 54
Commerce Court West
Toronto, Ontario
M5L 1C2

City of Kitchener
P.O. Box 1118
Kitchener, Ontario
N2G 4G7
Att. Mr. J. Kranenburg
Director of Utilities

Inter-City Gas Corporation (Ontario)
P.O. Box 219
1610 Rosser Avenue
Brandon, Manitoba
R7A 5Z1
Att. Mr. G. Hoffman
Vice-President - General Manager

Natural Resource Gas Limited
P.O. Box 3117, Terminal 'A'
London, Ontario
N6A 4J4
Att. Mr. W. Blake
General Manager

Public Utilities Commission
of the City of Kingston
P.O. Box 790
211 Counter St. at Lappan's Lane
Kingston, Ontario
K7L 4X7
Att. Mr. J.K. Fee
General Manager

Union Gas Limited
50 Keil Drive North
Chatham, Ontario
N7M 5M1
Att. Mr. J.B. Jolley
Vice-President, General Counsel
and Secretary

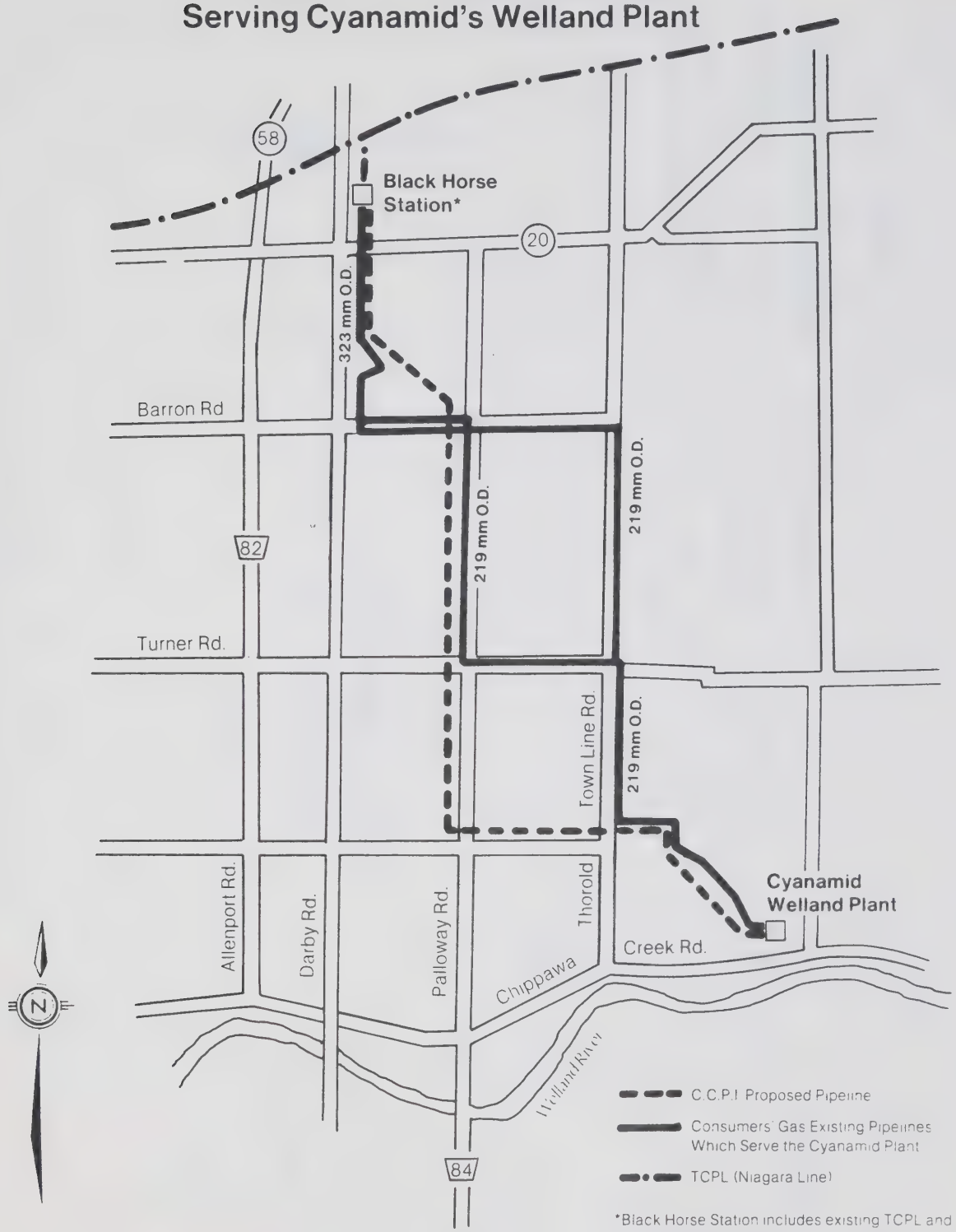
Appendix III
To Order GH-3-86

"The Herald"	in Calgary, Alberta
"The Edmonton Journal", and "Le Franco-Albertain"	in Edmonton, Alberta
"The Welland-Port Colborne Tribune" and "Journal L'Écluse"	in Welland, Ontario
"The Sun Province", and "Le Soleil de Colombie"	in Vancouver, British Columbia

"The Times-Colonist"	in Victoria, British Columbia
"The Winnipeg Free Press"	in Winnipeg, Manitoba
"La Liberté"	in St. Boniface, Manitoba
"Le Devoir" and "The Gazette"	in Montreal, Quebec
"Le Journal de Québec" and "The Chronicle Telegraph"	in Quebec, Quebec
"The Leader-Post" and "Journal L'eau Vive"	in Regina, Saskatchewan
"The Globe and Mail" and "L'Express"	in Toronto, Ontario
"The Citizen", "Le Droit", and "The Canada Gazette"	in Ottawa, Ontario

Appendix II

Existing and Proposed Facilities Serving Cyanamid's Welland Plant

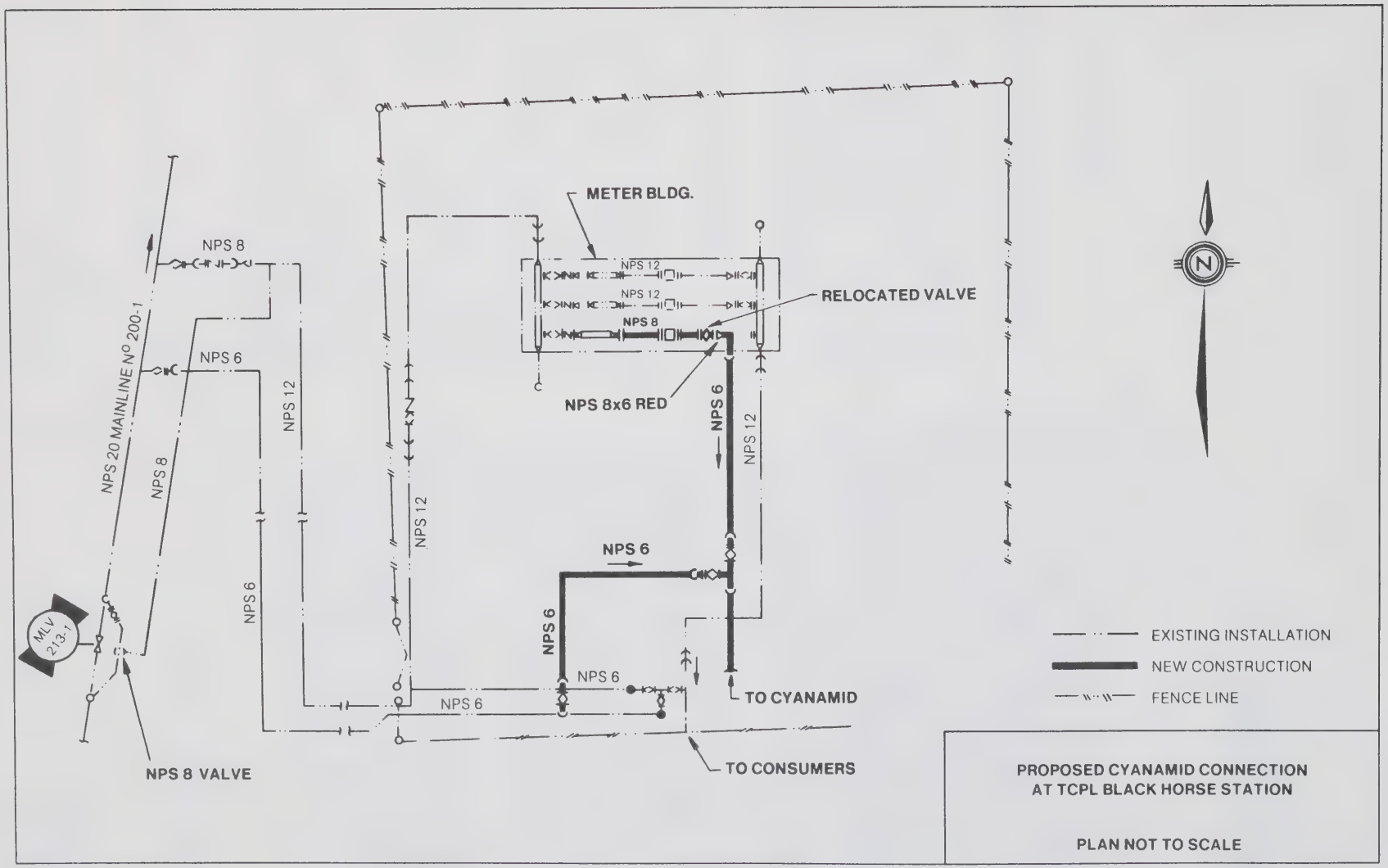


*Black Horse Station includes existing TCPL and Consumers Meter Stations

Consumers' lines which do not serve the Cyanamid Plant are not shown

Modified from Consumers' Exhibit C54

Design of Proposed TCPL Connection
(Modified from TCPL's Exhibit No. C-66)



Appendix III

Appendix IV

Order No. XG-13-86

IN THE MATTER OF the National Energy Board Act and the Regulations made thereunder; and

IN THE MATTER OF an application, pursuant to section 49 of the National Energy Board Act, by Cyanamid Canada Pipeline Inc. for an Order exempting its proposed pipeline for the transmission of gas, in the Province of Ontario, from the provisions of certain sections of the Act, filed with the Board under File No. 1555-C132-1.

BEFORE the Board on 15 December 1986.

WHEREAS an application has been filed by Cyanamid Canada Pipeline Inc. (hereinafter called "the Applicant"), dated 3 October 1985, as revised in its submission of 19 August 1986, for an Order pursuant to section 49 of the Act, exempting from the provisions of certain sections of the Act a proposed pipeline for the transmission of gas, together with all appurtenances and works connected therewith, to be situated at the hereinafter described location, as more particularly set out in the application;

AND WHEREAS the Applicant has represented that its proposed pipeline is required to transport gas purchased by the Applicant from the Black Horse Meter Station of TransCanada PipeLines Limited to the Welland Plant of Cyanamid Canada Inc.;

AND WHEREAS the Board has found that the proposed pipeline is in the public interest;

IT IS ORDERED THAT pursuant to section 49 of the Act the proposed pipeline for the transmission of gas, being an NPS 8 (219.1 mm O.D.) line of pipe having a length of approximately 6.2 km together with all appurtenances and works connected therewith, extending from a point at or near the Black Horse Meter Station site of TransCanada PipeLines Limited situated in part of Lot 92, City of Thorold in the Regional Municipality of Niagara, to a point within the Welland Plant site of Cyanamid Canada Inc., in the City of Thorold in the Regional Municipality of Niagara, all in the Province of Ontario, is exempt from the provisions of paragraph 26(1)(a), subsection 26(2) and sections 27 and 28 of the Act, upon the following conditions:

1. The Applicant shall, at least 20 days prior to the commencement of construction, submit to the Board,

   (a) final design drawings, and material specifications for the line pipe, pipeline components and coating of the pipe, and

   (b) a description of procedures to be employed to mitigate the effects of electrical induction by nearby high voltage AC transmission lines, during construction and operation of the pipeline.

2. The Applicant shall submit plans, profiles and books of reference for the proposed pipeline and follow the procedures set out in section 29.1 of the Act unless it files option agreements, signed by all affected private landowners, with the Board, prior to the commencement of construction.

NATIONAL ENERGY BOARD

J.S. Klenavic
Secretary

Appendix V

Order No. MO-63-86

IN THE MATTER OF the National Energy Board Act and the Regulations made thereunder; and

IN THE MATTER OF an application, pursuant to subsection 59(3) of the National Energy Board Act, filed with the Board under File Nos. 1555-C132-1 and 1571-T1-4.

BEFORE the Board on 15 December 1986.

WHEREAS Cyanamid Canada Pipeline Inc. (hereinafter called "CCPI") requested by application dated 3 October 1985, and by letter dated 14 August 1986 an Order requiring TransCanada PipeLines Limited (hereinafter called "TransCanada") to provide adequate and suitable facilities for the junction of its pipeline with the proposed facilities of CCPI for the transmission of gas at the hereinafter described location;

AND WHEREAS the National Energy Board (hereinafter called "the Board") by Order No. XG-13-86, dated 15 December 1986, has approved the proposed facilities of CCPI after a public hearing was held in the City of Ottawa, Ontario, from 25 August 1986 to 3 September 1986, as set down by Order No. GH-3-86 dated 14 July 1986;

AND WHEREAS the Board has taken into consideration TransCanada's submissions to the hearing and TransCanada's Hearing Exhibit C-66 which related to the metering and piping facilities required for the junction of TransCanada's pipeline with the proposed facilities of CCPI;

AND WHEREAS the Board is satisfied that no undue burden will be placed upon TransCanada and that the granting of the application is consistent with the public interest;

IT IS ORDERED THAT pursuant to subsection 59(3) of the Act, TransCanada shall provide adequate and suitable facilities for the junction of its pipeline, as described in Exhibit C-66, with the proposed facilities of CCPI for the transmission of gas at TransCanada's Black Horse Meter Station situated in part of Lot 92, City of Thorold in the Regional Municipality of Niagara, in the Province of Ontario;

AND IT IS FURTHER ORDERED THAT pursuant to section 49 of the Act the facilities for the junction of the pipeline of TransCanada with the proposed facilities of CCPI, being additional piping and metering facilities together with all appurtenances and works connected therewith, to be located at TransCanada's Black Horse Meter Station at the hereinbefore described location, are exempt from the provisions of paragraph 26(1)(a), subsection 26(2) and sections 27, 28 and 29 of the Act.

NATIONAL ENERGY BOARD

J.S. Klenavic
Secretary